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ABSTRACT

This book provides a comprehensive analysis of federal laws and court decisions addressing the rights of persons with disabilities including the following: the U.S. Constitution; Section 504 of the Rehabilitation Act; Sections 501 and 503 of the Rehabilitation Act; Americans with Disabilities Act; Education for All Handicapped Children Act; the Architectural Barriers Act; the Fair Housing Act; the Urban Mass Transportation Act; and the Federal-Aid Highway Act. Topics addressed include the following: equal protection and fundamental rights; procedural issues; recipients of federal financial assistance; eligibility as a handicapped individual; "reasonable accommodations" for otherwise qualified individuals; discrimination and special issues regarding education and employment; access to services; remedies and attorneys' fees; access to transportation; architectural barriers; housing; special education issues (e.g., confidentiality, due process, handicapped infants and toddlers, judicial review, discipline, private schooling, third party payments, least restrictive environment, and individualized education programs); and disabled newborns. (DB)

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Legal Rights of Persons with Disabilities

An Analysis of Federal Law

Bonnie P. Tucker
Bruce A. Goldstein

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To my children, Kevin, Ronale and Scott, and my parents, Thelma and James Poitras, with love

Bonnie P. Tucker

To my wife and children, Betsy, Lisa and Dena, my parents, Sally and Lew, and my "parents," Annette and Jack, with love

Bruce A. Goldstein

This publication was designed to provide accurate and authoritative information in regard to the subject matter covered. It is published with the understanding that neither the authors nor the publisher is engaged in rendering legal or professional service. If legal advice or other expert assistance is required, the service of a competent professional should be sought.

About the Authors

Bonnie P. Tucker is an Attorney and Associate Professor of Law at Arizona State University College of Law. She received her J.D. from the University of Colorado. Prior to her work at Arizona State she clerked for the Honorable William E. Doyle of the Tenth Circuit U.S. Court of Appeals and was a partner with the firm Brown & Bain, P.A. She has been admitted to the state bars of Colorado, Arizona, and California.

Tucker is a prolific professional writer and public speaker. Among her more recent publications are three law review articles: "Section 504 of the Rehabilitation Act After Ten Years of Enforcement: The Past and the Future" (*University of Illinois Law Review*, 1989); "The Americans with Disabilities Act: An Overview" (*University of Illinois Law Review*, 1989); and "Deaf Prison Inmates: Time to be Heard" (*Loyola of Los Angeles Law Review*, 1988). She has taught summer courses at both the San Diego College of Law and the University of Colorado School of Law. Tucker has spoken at conferences from coast to coast, and has been the keynote speaker at such events as the Maryland Department of Education Annual Conference and the Arizona Speech-Language-Hearing Association Annual Conference. She has also been profiled on many media shows including CNN News and ABC's *Nightline*.

Tucker is an active member of the governing body of numerous organizations, including the Alexander Graham Bell Association for the Deaf and the Rochester Institute of Technology. The U.S. Secretary of Education appointed her to the National Advisory Group to the National Technical Institute for the Deaf in 1981.

Bonnie Tucker has received many honors and awards throughout her career, ranging from the Order of the Coif and both the Folsom and Brophy Awards in law school to the Take Charge Award from the National Women's Economic Alliance

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Bruce A. Goldstein is a partner with the law firm of Bouvier, O'Connor in Buffalo, New York and an adjunct professor at the State University of New York at Buffalo Faculty of Law and Jurisprudence. He received his J.D. from the University of Michigan Law School, *cum laude*.

Goldstein has taught, written and spoken widely in his areas of expertise, which include both disabilities law and education law. Organizations that have sponsored him include Cornell University, the New York State Bar Association, *Education for the Handicapped Law Report's* National Institute on Legal Rights of the Handicapped, Children's Hospital of Pittsburgh and St. Christopher's Hospital of Philadelphia, and the New York State Departments of Health and Social Services. He has appeared twice on the Phil Donahue Show. His more recent presentations encompassed "Legal Literacy for Rehabilitation Counselors," "Legal Rights of Disabled Children," "Serving the College Student with a Learning Disability," "Medical Ethics and the Law: Are They Compatible?," and "Society's Obligation to the Defective Newborn: a Long-Term Perspective." In written form Goldstein's latest contributions are a chapter in *The Education Law and You*, edited by H.T. Prickett, on "Advocacy for Deaf Children" (1989) and "Legislative Delegation of Authority—Conservatorship, Committees, Power of Attorney, 17-A Guardianships," in *Representing People with Disabilities*, edited by Peter Danziger, Esq. (1990).

Goldstein's professional memberships stretch across more than two dozen organizations, many of which he has helped to guide. A sample of these includes the Erie Coordinating Council of Handicapped Organizations (ECCHO), which he founded; the New York State Developmental Disabilities Planning Council, for which he has served as Executive Committee member; the New York State Assembly Task Force on the Disabled; and the Alexander Graham Bell Association of the Deaf, for which he has served as Executive Committee member and as Chairperson of its affiliated International Parents Organization.

Over the course of his professional life, Goldstein has been inundated with more than a dozen Certificates of Appreciation from organizations such as Self Help for the Hard of Hearing, Housing Opportunities Made Equal, and the Alexander Graham Bell Association. In addition, the Rehabilitation Association of Western New York awarded him the John A. Evanko Certificate of Merit, and the *Buffalo News* declared him Citizen of the Year for 1989.

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1

Introduction

Currently there are approximately 43 million Americans with physical or mental disabilities.[1] Historically, handicapped (or disabled)[2] individuals have been subjected to egregious oppression and discrimination. There are numerous publications that describe in great detail the evolving segregation and persecution of handicapped persons — in America as well as in other countries.[3] This book will not discuss that tragic history, but will instead focus on current forms of discrimination against disabled Americans and the major federal laws aimed at alleviating such discrimination.

Discrimination against disabled persons in late-twentieth century American society takes many forms. Disabled people are frequently relegated to second-class citizenship by virtue of five different factors: (1) intentional exclusion from the mainstream of society; (2) segregation, whether intentional or unintentional;

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[1] *See* The Americans with Disabilities Act of 1990 (ADA) §2(a)(1), 136 *Cong. Rec.* H4582 (July 12, 1990).

[2] Many persons with disabilities prefer to be called "disabled" rather than "handicapped." The term "handicap" is felt by many to have a derogatory connotation, since literally translated it means "hand in cap," which implies that people with disabilities must ask for handouts or charity. Indeed, some disabled people would prefer to utilize the term "physically challenged" rather than "handicapped" or "disabled." The terms "handicapped" and "disabled" are utilized interchangeably — and synonymously — in this book, however, for the reason that some laws dealing with the rights of disabled people use one term (handicapped) while other laws use the second term (disabled).

[3] *See, e.g.*, U.S. Commission on Civil Rights, "Accommodating the Spectrum of Individual Abilities," (Clearinghouse Publication No. 81, September 1983) (hereinafter "Accommodating the Spectrum of Individual Abilities"); R.L. Burgdorf, Jr., Ed., *The Legal Rights of Handicapped Persons* (Paul H. Brookes, 1980).

(3) the provision of unequal or inferior services, benefits or activities; (4) the provision of less effective services, benefits or activities; and (5) the use of screening criteria that do not correlate with actual ability and have a disparate impact on people with disabilities.[4]

When discussing discrimination against disabled people it is important to note that discrimination on the basis of disability differs in some respects from discrimination on the basis of other factors, such as race or sex. Factors such as race, and in most cases sex, do not generally create any rational difference between individuals that relate to meaningful criteria, such as ability or qualification to perform in a job or program. Thus there is rarely, if ever, a reason to treat persons of different races or sexes differently. Conversely, an individual's handicap *may* — to differing degrees — affect his or her ability to perform, and thus *may* — to differing degrees — constitute a permissible reason for treating that individual in a different manner. Because in many cases there are meaningful differences between disabled and non-disabled individuals, it cannot automatically be assumed that *all* different treatment of disabled persons is discriminatory. Moreover, because frequently there are meaningful differences between disabled and non-disabled individuals, the underlying premise of discrimination on the basis of factors such as race differs in some respects from the underlying premise of discrimination based on handicap. Usually discrimination on the basis of race is premised on a totally irrational and hostile animus. To the converse, while some discrimination against handicapped people is premised on a hostile animus, discrimination on the basis of handicap is frequently premised on other factors:

First, the so called "able-bodied" members of our society often feel discomfort and embarrassment around disabled people. They are uneasy and do not know how to react toward people with disabilities. They may feel actual aversion to some people with disabilities. These feelings may cause non-disabled people to treat disabled people differently.

Second, non-disabled people often patronize and pity people with disabilities, and thus treat disabled people in a paternalistic fashion. While this form of different treatment is based on compassion, such benevolent paternalism is premised on a lack of respect for, and fails to recognize the dignity of, disabled people.

Third, unfounded stereotypes about the purported incapabilities of disabled people abound in our society. Non-disabled people often hold unduly restrictive beliefs about the purported limiting effects of disabilities. As the Tenth Circuit stated in *Pushkin v. Regents of the University of Colorado*, discrimination against handicapped people "often occurs under the guise of extending a helping hand or a mistaken, restrictive belief as to the limitations of handicapped persons."[5]

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[4] *See generally*, "Accommodating the Spectrum of Individual Abilities," *supra* note 3, at 40-42.

[5] 658 F.2d 1372, 1385 (10th Cir. 1981).

Fourth, our society has attached unpleasant stigmas to disabling conditions. Disabilities are viewed by many Americans as very negative, undesirable characteristics, and thus people having disabilities are often treated in a negative manner.[6]

Finally, much of the discrimination faced by disabled Americans is a result of thoughtlessness and indifference leading to benign neglect, rather than a result of a hostile animus. The Supreme Court noted in *Alexander v. Choate*[7] that Congress has recognized that discrimination against handicapped people is "most often the product, not of invidious animus, but rather of thoughtlessness and indifference — of benign neglect," and that "[f]ederal agencies and commentators on the plight of the handicapped . . . have found that discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus."[8] All of these factors contribute to the "second class citizenship" status of disabled Americans.

For at least 20 years handicapped people have fought for the passage of laws to assist in bringing them into the mainstream of American society as first class citizens. As a result of the concentrated lobbying activities of handicapped persons and their advocates, in the early 1970s Congress passed several laws dealing with the rights of people with disabilities. Among the most prominent were Sections 501, 503, and 504 of the Rehabilitation Act of 1973[9] and the Education for All Handicapped Children Act (EAHCA).[10] In a nutshell, Sections 501, 503 and 504 prohibit federal agencies, federal contractors and recipients of federal financial assistance from discriminating against otherwise qualified handicapped persons solely on the basis of handicap, while the EAHCA requires states to provide all handicapped children with a free, appropriate public education. Despite the passage of these and other relevant laws, discrimination against handicapped persons continues to be a significant problem in this country.

While the Rehabilitation Act of 1973 prohibited discrimination on the basis of handicap by recipients of federal financial assistance, as of early 1990 no federal law prohibited the majority of employers, program administrators, owners and managers of places of public accommodation and others from discriminating at will against disabled people.[11] Thus, as late as early 1990 Americans with disabilities continued to suffer discrimination in *all* walks of life. Indeed, in the late 1980s disabled Americans were sometimes prevented from going to movies or other places of entertainment, or from dining in restaurants, because managers or owners of such facilities did not like their looks. One disabled person recounted a situation in which people attempted to forcibly remove her and her disabled friend from an auction house because they were "disgusting to look at."[12] Another disabled person, a victim of cerebral palsy, recounted a 1988 incident in which the owner of a movie theater prohibited her from attending movies at his theater because "I don't have to let her in here, and I don't want her in here."[13] Disabled people in wheelchairs frequently tell of being refused service in restaurants.[14]

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[6] For a comprehensive discussion of these four factors *see* "Accommodating the Spectrum of Individual Abilities," *supra* note 3, at 23-27.

[7] 469 U.S. 287, 105 S. Ct. 712 (1985).

[8] 469 U.S. at 295-96, 105 S. Ct. at 716-17.

[9] 29 U.S.C.A. §§791, 793 and 794 (West Supp. 1990). *See* chapters 3-9 of this text for a comprehensive analysis of those laws.

[10] 20 U.S.C.A. §§1400-1485 (1990). *See* chapters 13-18 of this text for a comprehensive analysis of the EAHCA.

[11] In addition to federal laws dealing with discrimination against handicapped people, during the late 1970s and 1980s most states enacted laws that prevent some forms of discrimination against people with disabilities. An analysis of those state laws is beyond the scope of this book. It should be noted,

Other recent illustrative incidents of discrimination against disabled people include: (1) the refusal of a New Jersey private-zoo owner "to admit children with Down Syndrome to the monkey house because, he claimed, they upset his chimpanzees,"[15] (2) the refusal of a bank to allow a mentally retarded man to open a bank account because he did not fit the image the bank wanted to project;[16] (3) the action of "an airline employee in New York who resented having to help a 66-year-old double amputee board a plane [and thus] instead threw him on a baggage dolly";[17] (4) the refusal of a taxi driver in Washington, D.C. to pick up a woman in a wheelchair;[18] and (5) the action of a police officer in pointing his gun at the head of a disabled person, cocking it, and "pull[ing] the trigger on an empty barrel

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however, that the state laws vary tremendously in scope and effect, and in many cases merely provide superficial relief.

[12] *Americans with Disabilities Act of 1989*, S. Rep. No. 116, 101st Cong., 1st Sess. 7 (1989) (hereinafter Senate Committee Report).

[13] *Americans with Disabilities Act of 1989: Hearings Before the Commission on Labor and Human Resources* and the *Subcommittee on the Handicapped*, 101st Cong., 1st Sess. 64-65 (1989) (testimony of Lisa Carl and Vickie Franke) (hereinafter Senate Hearings May and June 1989).

[14] *See, e.g.*, Senate Hearings May and June 1989, *supra* note 13, at 70 (testimony of Ronald L. Mace — a wheelchair user — explaining that he and his wife were refused service in a seafood restaurant because they "could not sit on the stools at the oyster bar"; when asked about other arrangements Mr. and Mrs. Mace and their party were told "to get out and don't ever come back"); *Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing Before the Subcommittee on Select Education of the Committee on Education and Labor*, 100th Cong., 2d Sess. 39 (1989) (statement of Linda Pelletier explaining that a restaurant in Boston refused to serve alcohol to her and her friend who were wheelchair bound) (hereinafter *Oversight Hearing on H.R. 4498*).

[15] *See* J.S. Shapiro, "Liberation Day for the Disabled" 107 *U.S. News*, 11: 20 (September 18, 1989) (hereinafter "Liberation Day for the Disabled"); Senate Committee Report, *supra* note 12, at 7.

[16] "Owens Says Disability Rights Bill is a Victory for all Americans," U.S. House Education and Labor Committee News Release, 1 (November 15, 1989).

[17] "Liberation Day for the Disabled," *supra* note 15.

[18] Senate Committee Report, *supra* note 12, at 7.

because he thought it would be 'funny' since [the disabled individual has] quadrapereses and couldn't flee or fight."[19]

The plight of disabled Americans is exemplified by looking to the area of employment. Studies show that in the late 1980s only two-thirds of working-age Americans with disabilities who were able to be employed had jobs, and those who did were working in positions below their capabilities.[20] This was so because many employers refused to hire disabled people, and because those disabled people who were employed were often left in entry-level positions and not promoted in accord with their abilities.[21] Indeed, despite the existence of the Rehabilitation Act of 1973 and some state laws prohibiting employment discrimination on the basis of handicap, in the late 1980s disabled people *lost* ground in their fight for equal employment opportunities. A 1989 report from the United States Census Bureau showed that: (1) in 1981, 29.8 percent of disabled men worked full-time, while in 1988 only 23.4 percent of disabled men worked full-time; (2) in 1988 only 13.1 percent of disabled women worked full-time (up from 11.4 percent in 1981); (3) the earnings of disabled men fell from 77 percent of what all workers made in 1981 to 64 percent of what all workers made in 1988; and (4) the earnings of disabled women fell from 69 percent of what all workers made in 1981 to 62 percent of what all workers made in 1988.[22]

There is no logical reason for these statistics. The stereotypical fear that hiring disabled employees is excessively costly is more myth than fact. In a recent survey, three-quarters of the managers who had hired both disabled and non-disabled employees reported that the average cost of employing a disabled person is approximately the same as the cost of employing a non-disabled person.[23] Moreover, frequently the cost to employ a disabled worker involves minimal expenditures, such as the purchase of a $50 headset for a phone to allow an insurance salesperson with cerebral palsy to write while talking, or the purchase of a $27 timer with an indicator light to allow a deaf medical technician to perform laboratory tests.[24] Indeed, a 1982 study of accommodations provided to handicapped employees by federal contractors pursuant to Section 503 of the Rehabilitation Act[25] found that only 22 percent of disabled workers required special accommodations; of that 22 percent, 31 percent of the accommodations required were achieved at no cost and 30 percent were achieved at a cost of under $500 per worker.[26] And, contrary to the fears of some employers, the costs of insurance or of workers' compensation fees do not increase when an employer hires handicapped workers.[27] Moreover, disabled employees are often found to be better workers than non-disabled employees.[28] An executive of E.I. DuPont de Nemours and Company, which employs more than 1,452 disabled workers, sums this information up handily: "Every one of [the] reasons for not [hiring disabled employees] is not only a myth — but has been proven to hold no semblance of fact whatsoever."[29] Nevertheless, employment discrimination against disabled Americans is so prevalent that as recently as early 1990 over eight million disabled Americans who wanted to work were denied jobs and thus were forced to depend on government subsidies — to the disadvantage of *all* Americans.

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[19] *Oversight Hearing on H.R. 4498, supra* note 14, at 167 (statement of Cynthia L. Miller).

[20] *See, e.g., Oversight Hearing on H.R. 4498, supra* note 14, at 9 (concluding that "about 8.2 million people with disabilities want to work but cannot find a job"); Senate Committee Report, *supra* note 12, at 9 ("[t]wo-thirds of all disabled Americans between the age of 16 and 64 are not working at all; yet . . . [s]ixty-six percent of working age disabled persons, who are not working, say that they would like to have a job").

[21] *See, e.g.*, "Study on Disabled and Jobs Finds Work and Good Pay are Scarce," *The New York Times*, August 16, 1989, A 22 (stating, *inter alia*, that there is powerful evidence that there is a tendency by employers to leave [disabled employees] stuck in entry-level positions) (hereinafter *The New York Times*).

[22] *See, e.g., The New York Times, supra* note 21; Robert P. Hey, "Study Finds Workers With Disabilities Losing Ground," *The Christian Science Monitor*, August 17, 1989, 7.

[23] Louis Harris and Associates, Study No. 8640009, the ICD Survey II: Employing Disabled Americans 9 (1987) (hereinafter Harris Study). Only 13 to 17 percent of managers considered it "more expensive to employ a disabled person." [*Id.*]

A second area illustrating the discrimination faced by disabled Americans is that involving transportation. Access to public transportation services is imperative for disabled Americans. Generally, public bus transportation is the only travel available to poor or rural Americans,[30] and disabled Americans are "three times more likely to fall below the Federal poverty line than nondisabled Americans," and "live in rural areas in higher concentrations than the nondisabled."[31] Moreover, because disabled people often have low incomes and are unable to afford the cost of private cars (much less the cost of specially equipped private cars for some mobility-impaired persons), and because some disabilities (blindness, for example) preclude disabled people from driving, people with disabilities must often rely heavily upon public transportation to conduct their daily lives. Thus, as one commentator has noted:

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[24] Senate Committee Report, *supra* note 12, at 10.

[25] 29 U.S.C.A. §793 (1985).

[26] Berkeley Planning Associates, "Study of Accommodations Provided to Handicapped Employees by Federal Contractors, 1982" (cited in *The Christian Science Monitor*, September 11, 1989, Letter to the Editor, 20).

[27] *See, e.g.*, "Hiring the Handicapped: Overcoming Physical & Psychological Barriers in the Job Market," *Journal of American Insurance*, Third Quarter, 13, 17 (1986) ("[e]mployers hiring disabled workers do not . . . see an increase in their workers' compensation insurance premiums"); Comment,"Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled," 61 *Georgetown Law Journal* 1501, 1513 (1973) ("employment of the handicapped does not affect the premium rates either for non-occupational benefit plans or for workmen's compensation"). *See also*, R.B. Nathanson, "The disabled employee: separating myth from fact," *Harvard Business Review*, 6-8 (May-June 1977).

[28] This fact was shown in a recent study conducted of managers of 21 companies. See Harris Study, *supra* note 23, at 3, 8, 47.

[29] Senate Committee Report, *supra* note 12, at 28.

[30] B. Wade, "A Bill of Rights for the Disabled Near Passage," *The New York Times*, December 17, 1989 (quoting Marilyn Golden, policy analyst with the Disability Rights Education and Defense Fund).

[31] *Id.*

> To have less than adequate accessible public transportation services for an individual who is protected from discrimination in employment, or who has received other numerous federally funded services, is analogous to throwing an 11-foot rope to a drowning man 20 feet offshore and then proclaiming you are going more than halfway.[32]

The Senate Committee on Labor and Human Resources has recognized that " 'access to transportation is the key to opening up education, employment, [and] recreation,' " and thus it is imperative that we have an " 'accessible public transportation system in this country.' "[33] Yet, despite the necessity for us to provide these non-discriminatory public transportation services, disabled Americans continue to confront serious discrimination in that area.[34] By way of example, as of early 1990 very few rail and only approximately one-third of the public buses in this country were accessible to disabled riders.[35]

In 1990 the Americans with Disabilities Act (ADA)[36] was enacted to assist in remedying the currently existing problems relating to access by handicapped persons to public facilities, employment and transportation services. While it will be some time before the practical effects of the ADA are known, it is widely hoped that the law will live up to its potential and assist in alleviating much of the currently existing discrimination against disabled people.

A further example of the discrimination facing disabled Americans lies in the field of education. Although the Supreme Court ruled in 1954 that *racially* segregated schools were prohibited by the United States Constitution,[37] automatic segregation of handicapped children was not barred by federal law until the enactment of the Education for All Handicapped Children Act (EAHCA) in 1975.[38] Federal intervention was deemed necessary because over half of the more than eight million handicapped children in this country were not receiving "appropriate educational services which would enable them to have full equality of opportunity,"[39] and one million of those children were excluded entirely from the public school system.[40]

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[32] Senate Committee Report, *supra* note 12, at 13 (testimony of Harold Russell on behalf of the President's Committee on Employment of People with Disabilities).

[33] Senate Committee Report, *supra* note 12, at 13.

[34] See chapter 10 of this text, *infra*.

[35] According to John Cikota, Chief, Passenger Service Division, Federal Railroad Administration, at best only about 20 percent of the country's passenger rail stations were accessible to disabled people in early 1990. Moreover, in 1989 the American Public Transit Authority conducted a survey of its approximately 375 member transit companies. Three hundred and two companies responded to the survey. Of the 52,888 buses possessed by those companies, 19,087, or 36 percent, were equipped with lifts or ramps for wheelchair access.

[36] *See* 136 *Cong. Rec.* H4582 (July 12, 1990).

[37] *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S. Ct. 686 (1954).

The significance of imbuing handicapped children with educational rights cannot be overstated. As one commentator has remarked:

> There is perhaps no group of students for whom education is more significant than students with mental and physical disabilities. A good education can mean the difference between a life of dependence and unemployment and a life of independence and productivity. In a society too frequently preoccupied with defining people in terms of their disabilities, a good education offers people an opportunity to define themselves in terms of their abilities.[41]

The state of affairs with respect to the education of handicapped children that led to enactment of the EAHCA involved several factors. First, handicapped children were excluded from public school educations by a number of means, such as

> placing them on long waiting lists; using disciplinary procedures to remove handicapped children with behavior problems from classrooms; initiating limited (if any) child census programs to identify children; failing to provide . . . educational programs to some institutionalized children; choosing to educate one group of handicapped children rather than another; and denying all education to some children.[42]

Second, many children were misclassified either as handicapped *per se* or as having a particular type of handicap. This was due in large part to several deficient practices — racially and culturally biased evaluation procedures, single criterion rather than multi-factored procedures, untrained personnel, a dearth of multidisciplinary assessment and an inability to focus on more than one area of disability at a time.[43]

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[38] 20 U.S.C.A. §§1400-1485 (1990).

[39] 20 U.S.C.A. §1400(b)(3) (1990).

[40] 20 U.S.C.A. §1400(b)(4) (1990).

[41] National Council on Disability, Report to the President and the Congress of the United States, "The Education of Students with Disabilities: Where Do We Stand?," (September 1989) (hereinafter National Council on Disability Report).

[42] *See* H.R. Turnbull, III, M.J. Brotherson, M.J. Czyzewski, D.S. Esquith, A.K. Otis, J.A. Summers, A.K. VanReusen and M. DePazza-Conway, "A Policy Analysis of 'Least Restrictive' Education of Handicapped Children," 14 *Rutgers Law Journal* 489, 497-98 (1983) (hereinafter "A Policy Analysis of 'Least Restrictive' Education of Handicapped Children"), generally citing E. Levine and E. Wexler, "PL 94-142: An Act of Congress" (1982) and Comment, "The Least Restrictive Environment of the Education of All Handicapped Children Act of 1975: A Legislative History and an Analysis," 13 *Gonzaga Law Review* 717 (1978).

Third, many handicapped children were being inappropriately educated because classroom teachers were provided with neither the resources nor the training to address the needs of handicapped students.[44] In addition, "[e]ducational opportunities for handicapped children were restricted because a full range of services often was not available. Typically, the only placement available was in separate classrooms or schools."[45]

Enactment of the EAHCA signaled a major shift in the national approach of public education, particularly as it related to education of handicapped children. Instead of applying one curriculum and methodology to all students in a given class (or school), the law now requires the provision of "special education and related services designed to meet [the] unique needs [of each handicapped child]. . . ."[46] In addition, the Act establishes a system of procedural safeguards guaranteeing parents a role in the educational decisionmaking for their children[47] and providing for a formal process through which to refer, evaluate and place all handicapped children.[48] An administrative hearing procedure is imposed by the Act to resolve disputes between parents and school districts concerning the classification or placement of a handicapped child.[49]

Although much progress has occurred in the education of handicapped children since implementation of the EAHCA in 1977, the primary focus during that time has been on process rather than on substance.[50] As a result, the goals of the EAHCA remain largely unfulfilled.

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[43] *See* "A Policy Analysis of 'Least Restrictive' Education of Handicapped Children," *supra* note 42, at 498, citing J. Gleidman and W. Roth, *The Unexpected Minority: Handicapped Children in America* (1981) at 178-82, 204-08 and also Nazzarro, *Comprehensive Assessment for Educational Planning* in F. Weintraug, A. Abeson and M. LaVor, Public Policy and the Education of Exceptional Children 33 (1976) and Miller & Miller, "The Education for All Handicapped [Children] Act: How Well Does it Accomplish Its Goal of Promoting the Least Restrictive Environment for Education?," 28 *DePaul Law Review* 321, 339-40 (1979) (hereinafter Miller & Miller).

[44] *See* "A Policy Analysis of 'Least Restrictive' Education of Handicapped Children," *supra* note 42, at 499, citing S. Sarason & J. Doris, "Educational Handicap, Public Policy, and Social History" at 321-54 and Miller & Miller, *supra* note 43, at 339-40.

[45] *See* "A Policy Analysis of 'Least Restrictive' Education of Handicapped Children," *supra* note 42, at 499.

[46] 20 U.S.C.A. §1400(c) (1990).

[47] 20 U.S.C.A. §1415 (1990); *See generally*, 34 C.F.R. §§300.500-300.514 (1988).

[48] *See generally*, 34 C.F.R. §300.530-300.543 (1988).

[49] 20 U.S.C.A. §1415 (1990); 34 C.F.R. §300.506 (1988).

[50] National Council on Disability Report, *supra* note 41, at 1.

Widespread efforts to reform the public education system as a whole have generally failed to address the needs of students with disabilities, probably for two reasons:

> First, special education is primarily viewed nationally as a separate educational system that is disconnected from the regular education reform movement. The special education system has evolved as a separate system with its own set of distinct organizational, educational and teaching practices. Second, attention to the needs of students with disabilities may be perceived as running counter to the emphasis on . . . more rigorous academic curricula and higher performance standards. This perception may serve to reinforce stereotypes of students with disabilities as low-achieving, resulting in low expectations of students with disabilities.[51]

Special education services thus have not been fully integrated either administratively or programmatically into the regular public school system. Rather, special education has evolved largely as a separate delivery system.[52]

The general failure of the EAHCA to reach its goals can be seen by examining the system's end product. Consider, for example, that the drop-out rate for students with disabilities as of 1987 was 36 percent, although the school drop-out rate for all students was 25 percent.[53] Further, while 56 percent of all students normally participate in postsecondary education programs, as of 1987 only 15 percent of students with disabilities were involved in such programs.[54] In addition, The National Council on Disability Report noted that — based on statistics gathered in 1987 — "[s]tudents with disabilities have significantly lower graduation rates than their non-disabled counterparts."[55] Of those handicapped students who took graduation competency tests, the report pointed out, close to one in four failed to pass *any* part of the test, a third passed *some* part of the test, and only 40 percent passed the entire test.[56] Indeed, approximately 40 percent of handicapped students fail to graduate from high school with either a diploma or a certificate of completion.[57]

A significant reason for these less-than-satisfactory results is that "[e]valuation procedures, disability classifications and resulting placement decisions . . .

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[51] *Id.* at 29.

[52] *Id.* at 34-35

[53] *Id.* at 2, citing Wagner, 1989.

[54] *Id.*

[55] *Id.* at 11.

[56] *Id.* at 11, citing Wagner & Shaver, 1989, Table 9, p. 18.

[57] *Id.* at 11, citing the 11th Annual Report to Congress of the U.S. Department of Education (1989) and the National Longitudinal Study, Wagner & Shaver, 1989.

often are not related to the students' learning characteristics."[58] In fact, once a child is labeled as having a particular handicap, that label is rarely lost. Many, if not most, handicapped children once labelled are not returned to the regular classroom.[59]

Further examination of the data on special education reveals another matter of great concern: the disproportionate percentage of minorities who are classified as handicapped students. As the National Council on Disability has noted:

> Although minority students comprise 30 percent of all public school students, they accounted for 42 percent of all students classified as educable mentally retarded [EMR], 40 percent of those classified as trainably mentally retarded [TMR] and 35 percent of those classified as seriously emotionally disturbed [SED]. The disproportion is greatest among Black students who comprised 16 percent of the student body but 35 percent of the EMR students, 27 percent of the TMR students and 27 percent of the SED students.[60]

The data also shows that specific populations of handicapped children have traditionally been underserved. First, services for handicapped children residing in rural areas have been particularly troublesome because the relatively small population base and the large distances between communities can present unique problems.[61] Second, handicapped children of military families have largely been excluded because Department of Defense Schools do not come within the scope of the EAHCA.[62] Finally, Native American preschool children with disabilities have been identified as both an underserved and underidentified population.[63]

One further crucial area of deficiency stands out: the great need to expand and focus — through the educational system — on vocational preparation and job placement in community sites. Many high school employment preparation programs are at best passively preparing students for employment because they fail to go beyond the general assessment of student interests and strengths. They merely teach vocational readiness skills in a classroom setting[64] — rather than providing hands-on experiences designed to result in actual vocational training. There is a great need to engage in transitional planning to prepare graduates for employment and to assist them in finding jobs for which they are qualified.[65]

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[58] National Council on Disability Report at 29.

[59] *Id.*

[60] *Id.* at 30, citing Lipsky & Gartner, 1989.

[61] National Council on Disability Report at 29.

[62] *Id.* at 23. The National Council on Disability also found that military families in the United States are not obtaining recourse under Section 504 of the Rehabilitation Act because the Office of Civil Rights refuses to set foot on Defense Department installations to investigate any allegation of non-compliance of Section 504.

[63] General Accounting Office Report, "Special Education: Estimates of Handicapped Indian Preschoolers and Sufficiency of Services" (1990).

[64] National Council on Disability Report, *supra* note 41, at 42.

Still other areas that must be addressed in order to provide an appropriate education for all handicapped children include (1) proper and adequate training of administrators and both regular and special education teachers,[66] and (2) the encouragement of parental involvement in the educational process. Research has shown that strong parental involvement in the educational process results in students' performing better.[67]

Even in the area of procedural protections — the area toward which most attention has been focused since 1977 — there remain difficulties. For example, fewer than one percent of the parents of children with handicaps have requested administrative hearings to challenge the educational placement of their children.[68] This statistic may be interpreted as indicating that parents have been satisfied with the services their children are receiving, but there is considerable concern that it actually reflects a lack of awareness that there are safeguards available to parents and a failure to understand parental rights.[69] Although school districts often forward a statement of rights to parents, "[v]ery few school personnel take the time to assure that parents of students with disabilities understand their rights,"[70] and very few attorneys have the expertise in special education law required to assist parents in asserting their children's rights.[71]

Presently, a debate is escalating between persons who favor integration of all (or virtually all) handicapped children and those who demand separate schools as a parental option for at least low-incidence disabilities.[72] Those who call for a full integration system base their position "on an equal rights principle, a strong distaste for segregation and all it implies, and evidence of poor outcomes of students with disabilities who have been educated in segregated classrooms and facilities."[73] Those who favor special schools claim that appropriate services "are unavailable in many regular classrooms [and] that many students with disabilities fail in regular classrooms . . . ."[74] The disagreement between these two philosophies may continue to be fought over each individual child. On the other hand, this disagreement and issues relating to the other areas in which the goals of the EAHCA have not yet been met may be addressed at the national level in the future.

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[65] *Id.* at 40.

[66] *Id.* at 36.

[67] *Id.* at 15.

[68] *Id.* at 13.

[69] *Id.*

[70] *Id.* at 24.

[71] *Id.* at 25-26.

[72] Low incidence disabilities include, for example, children who are deaf, blind or both. For the population at large, approximately .3 percent is deaf, .2 percent is legally blind and .002 percent is both deaf and severely visually impaired.

[73] National Council on Disability Report, *supra* note 41, at 31.

Summary

This book is intended to serve as an overview and analysis of the federal laws enacted by Congress to aid in eliminating the major types of discrimination confronted by disabled Americans who seek to participate in the mainstream of society. The topics covered include employment, education, public accommodations, housing, transportation, access to services, the elimination of architectural barriers, and special issues relating to disabled newborns. Familiarity with the primary issues and laws dealing with those topics will introduce — and sensitize — the reader to the depth of the discrimination faced by disabled Americans, and to the scope of awareness and effort required to alleviate that discrimination.

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[74] *Id.* at 32.

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Constitutional Rights

I. Introduction

This chapter focuses on the limited constitutional rights of persons with disabilities who strive to live within the mainstream of society. It does not address the constitutional rights of persons in institutions, because this text focuses primarily on the rights of persons with disabilities to participate in society at large.

The first section of the chapter reviews the Constitution's equal protection language and its application to disabled persons. In particular, that discussion analyzes the failure of courts to recognize any fundamental constitutional rights that specifically protect the interests of persons with disabilities.

The next section addresses educational rights and their relationship to the Constitution, focusing specifically upon constitutional educational rights for children with disabilities. The constitutional rights for handicapped children have, for the most part, been incorporated into and expanded upon in the Education for All Handicapped Children Act (EAHCA). The particulars of the EAHCA are detailed in chapters 13 through 18 of this text.

The last section of this chapter focuses on the employment arena. A discussion of constitutional rights for employees in general is followed by a more specific analysis of such rights as they relate to employees with disabilities.

II. Equal Protection and Fundamental Rights

The Fourteenth Amendment to the United States Constitution provides that no state may "deny to any person within its jurisdiction the equal protection of the laws." In essence, this Equal Protection Clause requires that a state must treat all similarly situated persons alike.[1] Although section five of the Fourteenth Amendment authorizes Congress to enact legislation enforcing the Equal Protection Clause, Congress has done so only in specific areas. The courts have provided guidance, however, for determining the validity of state legislation and state action in those instances where there is no applicable federal statute. "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[2]

This general rule does not apply, however, when a governmental entity differentiates — by legislation or otherwise — on the basis of race, alienage or national origin. As stated by the United States Supreme Court: "These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy. . . ."[3] Accordingly, laws providing for different treatment of such groups are "subjected [by courts] to *strict scrutiny* and will be sustained only if they are suitably tailored to serve a compelling state interest."[4] Strict scrutiny will also be applied when governmental action impacts upon personal rights protected in the Constitution, which are termed fundamental rights.[5]

Another exception to the general rule upholding legislation containing classifications that are rationally related to a legitimate state interest — the so-called rational basis standard — occurs when different treatment is based upon gender. This gender-based exception to the rational basis standard does not result in courts applying strict scrutiny, however. It results in the application of an intermediate standard called *heightened scrutiny*. As stated by the Supreme Court, "what differentiates sex from such non-suspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society."[6] Thus, the Court has held that in order to uphold different legislative treatment based upon gender classification, a court must find that the gender classification is substantially related to a sufficiently important governmental interest.[7]

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[1] *Plyler v. Doe*, 457 U.S. 202, 216, 102 S. Ct. 2382, 2394 (1982).

[2] *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254 (1985), citing *Schweiker v. Wilson*, 450 U.S. 221, 230, 101 S. Ct. 1074, 1080 (1981). *See also*, *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174-75, 101 S. Ct. 458, 459-60 (1980); *Vance v. Bradley*, 440 U.S. 93, 97, 99 S. Ct. 939, 942 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S. Ct. 2513, 2516 (1976).

[3] *City of Cleburne v. Cleburne Living Center*, 473 U.S. at 440, 105 S. Ct. at 3254 (1985).

[4] *City of Cleburne v. Cleburne Living Center*, 473 U.S. at 440, 105 S. Ct. at 3254 (1985), citing *McLaughlin v. Florida*, 379 U.S. 184, 192, 85 S. Ct. 283, 288 (1964), and *Graham v. Richardson*, 403 U.S. 365, 91 S. Ct. 1848 (1971) (emphasis added).

Strict scrutiny is the most intensive judicial review that can be applied by a court to determine the legitimacy of governmental action. The more typical standard calls for the court to determine whether the challenged governmental action has a rational basis. This latter standard recognizes that courts should typically defer to governmental decisions and presume that legislation or officials' actions are proper. An intermediate level of review — the intensity of which is somewhere between the other two standards — is termed heightened scrutiny.

See also, note 10, *infra*, for cases utilizing a modified approach when addressing different treatment for groups based on alienage.

[5] *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254 (1985), citing *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 89 S. Ct. 1886 (1969) (right to vote), *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322 (1969) (right to travel), and *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535, 62 S. Ct. 1110 (1942) (right to reproduce).

In *City of Cleburne v. Cleburne Living Center*[8] the Supreme Court denied mentally retarded persons the opportunity for judicial review of state legislation or state action under either a strict or heightened scrutiny standard by refusing to treat such persons as members of a suspect[9] or quasi-suspect[10] class. In *Cleburne*, the Cleburne Living Center (CLC) sought to operate a group home for mentally retarded persons. The city required CLC to apply for a special-use permit pursuant to a city zoning ordinance that required such permits for "[h]ospitals for the insane or feeble-minded, or alcoholic[s] or drug addicts, or penal or correctional institutions."[11] When the city denied the special-use permit, CLC filed suit. The district court found the zoning ordinance to be rationally related to the legitimate interests of the city. The Fifth Circuit reversed and found mental retardation to be a quasi-suspect classification.[12]

The Supreme Court affirmed the Fifth Circuit's holding that the CLC should be permitted to establish the group home, but it did so by a plurality finding that there was no rational basis for the city's action, not by finding that mentally retarded persons are a quasi-suspect class. The Supreme Court concluded that the city's action was based upon "an irrational prejudice against the mentally retarded. . . ."[13] In its opinion in *Cleburne*, the Court provided an extensive discussion and analysis of equal protection principles and explained why such increased protections as are available for groups based on race, alienage and national origin — strict scrutiny — as well as for groups based on gender — heightened scrutiny — are not available to persons who are mentally retarded. In the authors' opinion, the Court's analysis is less than convincing.

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[6] *Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S. Ct. 1764, 1770 (1973) (plurality opinion).

[7] *Mississippi University for Women v. Hogan*, 458 U.S. 718, 102 S. Ct. 3331 (1982); *Craig v. Boren*, 429 U.S. 190, 97 S. Ct. 451 (1976).

[8] 473 U.S. 432, 105 S. Ct. 3249 (1985).

[9] Suspect classes are limited to those based on race, alienage or national origin. Aliens, however, are sometimes treated as a quasi-suspect class. *See* note 10, *infra*.

[10] Currently, quasi-suspect classification is limited to gender and, in some situations, alienage. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2832 (1982) (treating alien students as a quasi-suspect class for purposes of education). As Justice Marshall stated in *Cleburne*:

> Alienage classifications present a related variant, for strict scrutiny is applied to such classifications in the economic and social area, but only heightened scrutiny is applied when the classification relates to "political functions." *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982); *see also Bernal v. Fainter*, 467 U.S. 216, 220-22 (1984). Thus, characterization of the area to which an alienage classification applies is necessary to determine how strongly it must be justified.

473 U.S. at 469, n.20; 105 S. Ct. at 3270, n.20 (dissent).

[11] 473 U.S. at 436, 105 S. Ct. at 3252.

[12] 726 F. 2d 191 (1984).

Although the ruling in *Cleburne* provided a favorable outcome for the proposed residents of the group home, the implications of the decision — which are not limited to those persons who are mentally retarded but clearly encompass all persons with disabilities — have caused concern to advocates. The Supreme Court stated that if it were to attribute quasi-suspect status to retarded persons "it would be difficult to find a principled way to distinguish a variety of other groups [including] the disabled. . . ."[14] Thus, although the *Cleburne* case involved only retarded persons, the implications of the Court's decision are much broader.

In its broad examination of equal protection principles, the Supreme Court stated its primary reason for distinguishing retarded persons as a group from suspect groups — such as those based on race, alienage, national origin and gender — as follows:

> [T]hose who are mentally retarded have a reduced ability to cope with and function in the everyday world. Nor are they all cut from the same pattern. . . . They are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one.[15]

This reasoning suffers from one primary weakness. The *Cleburne* majority fell prey to the common, yet insidious, trap of viewing and responding to people (in this case retarded persons) on the basis of a label. Despite acknowledging that all retarded persons are not "cut from the same pattern,"[16] the Court refused to provide quasi-suspect status to retarded persons based upon what it subconsciously perceived to be a *commonality* among such persons. But it is the *dissimilarity* among the broad group of persons who are appropriately classified as retarded that undercuts the Court's reasoning. In fact, the Court noted that "[t]he vast majority [of retarded persons] — approximately 89% — are classified as 'mildly' retarded."[17] Nevertheless, the Court accepted a stereotypical vision of mentally retarded persons and thus failed to address the critical issue — treating persons differently. In the authors' opinion, different treatment of persons solely because they possess a particular disability constitutes impermissible discrimination in and of itself. The more appropriate standard would be to limit different treatment by governmental entities to applications related to an individual's ability or inability to participate in or benefit from the program or matter at issue. Mildly retarded persons may be capable of performing many tasks; permitting legislative disqualification of such persons based solely on the fact that they are retarded fails to take their individual abilities into consideration. This factor should have been considered by the Court when determining whether to apply quasi-suspect status to retarded persons. Unfortunately, the long-standing and accepted difference in treatment of persons with disabilities was not only permitted by the Supreme Court in *Cleburne;* it was given the Court's imprimatur when the Court failed to disdain different treatment based upon disability labels.[18]

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[13] 473 U.S. at 450, 105 S. Ct. at 3260.

[14] 473 U.S. at 445, 105 S. Ct. at 3257.

[15] 473 U.S. at 442, 105 S. Ct. at 3255-56.

[16] *Id.*

[17] 473 U.S. at 442, n.9, 105 S. Ct. at 3255, n.9.

Nonetheless, the Supreme Court refused to grant quasi-suspect status to retarded persons. The Court stated:

> [W]e should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us. Because mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, and because both State and Federal Governments have recently committed themselves to assisting the retarded, we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate.[19]

The Court then delved into a very detailed analysis of the city zoning ordinance and its application to CLC. Although the plurality professed to apply a rational basis analysis, in the opinion of many commentators — including the authors — the Court in effect applied a heightened scrutiny analysis.[20] Moreover, a reading of the three separate opinions in this case indicates that a majority of the Court did not hold that classifications relating to mentally retarded persons should be analyzed differently than classifications based on race or sex.

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[18] The Court also cited other reasons for denying quasi-suspect status to retarded persons. The Court stated that "lawmakers have been addressing [retarded persons'] difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." [473 U.S. at 443, 105 S. Ct. at 3256]. Aside from permitting different treatment based upon a label, the Court rejected CLC's contention that heightened scrutiny could be limited to those circumstances in which legislation is designed to disadvantage retarded persons, rather than benefit them. Rather than addressing this contention directly, the court merely concluded that CLC's contention begs the question whether heightened scrutiny should be applied in the first instance. 473 U.S. at 444, 105 S. Ct. at 3256-57.

Another basis for the Court's denial of quasi-suspect status was the concern that "[a]ny minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect." 473 U.S. at 445, 105 S. Ct. at 3257. This appears to contradict the Court's previously stated rationale that mentally retarded persons have a reduced ability to cope with and function in the everday world. If that were in fact true, retarded persons would be in need of greater protection by the courts since they presumably would then be unable — in a very different way from other minority groups — to advocate for their own interests.

[19] 473 U.S. at 446, 105 S. Ct. at 3257.

The plurality opinion was written by Justice White on behalf of himself and Justices Powell, Rehnquist and O'Connor. Justice Stevens wrote a concurring opinion on behalf of himself and Chief Justice Burger. Although reaching the same end result, Justice Stevens refused to recognize the differentiation of suspect classes giving rise to strict scrutiny and quasi-suspect classes giving rise to heightened scrutiny. In addition, Justice Marshall — in an opinion written on his own behalf and on that of Justices Brennan and Blackmun — concurred in part and dissented in part to the majority's opinion. Justice Marshall concurred with the conclusion that the governmental action did not pass muster under the rational basis test. In addition, however, Justice Marshall opined that "the Court's wide-ranging discussion of heightened scrutiny is wholly superfluous to the decision of this case."[21] Justice Marshall's dissent was premised on the theory that since the Court determined that the governmental action was improper because it failed the rational basis test, the Court's entire discussion concerning heightened scrutiny constitutes dicta,[22] rather than a binding ruling.[23] Accordingly, only four justices (White, Powell, Rehnquist, and O'Connor) held that disabled persons should be treated differently than classes based on race, national origin, alienage and gender.

Nevertheless, the far-reaching implications of the plurality opinion in *Cleburne* can already be seen. An illustrative case is *Philadelphia Police and Fire*

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[20] *See, e.g.*, 473 U.S. at 458-60, 105 S. Ct. at 3264-65 (dissenting opinion of Justices Marshall, Brennan and Blackmun). *See also*, Comment, "The Supreme Court-Leading Cases", 99 *Harvard Law Review* 120, 167-69 (1985). The author noted: (1) the Court's unprecedented rejection of the immutability of a group's defining characteristic as one indicator of suspectness; (2) the Court's unexplained decision "not to examine whether the retarded are a 'discrete and insular' minority"; and (3) the Court's unprecedented reliance on the fact that remedial legislation had been passed when answering the question of whether the retarded were politically powerless or subject to significant prejudice. The author also vehemently objected to the Court's failure to inquire fully into the historical questions of prejudice and fear shown the retarded when denying quasi-suspect classification in part for the reason that retardation is often relevant to the achievement of legitimate state ends. *See also*, Comment, "Equal Protection and the Mentally Retarded: A Denial of Quasi-Suspect Status in *City of Cleburne v. Cleburne Living Center*," 72 *Iowa Law Review* 241, 251 (1986) (objecting to the Court's improper "conclusion that prejudice toward the mentally retarded no longer exists in light of the legislative responses to their difficulties"); Comment, "A Changing Equal Protection Standard? The Supreme Court's Application of a Heightened Rational Basis Test in *City of Cleburne v. Cleburne Living Center*," 20 *Loyola of Los Angeles Law Review* 921, 948-56 (1987).

[21] 473 U.S. at 456, 105 S. Ct. at 3263.

[22] Dicta is that portion of a court opinion that is not necessary to form the underpinning or foundation of the court's determination.

[23] 473 U.S. at 456-57 and note 1, 105 S. Ct. at 3263 and note 1.

Association for Handicapped Children v. City of Philadelphia.[24] That case involved a cut-back in funding from the State of Pennsylvania to the City of Philadelphia for programs and services for mentally retarded persons. Faced with reduced funds, Philadelphia chose to impose the weight of service reductions upon mentally retarded persons residing at home rather than spreading the reductions among all retarded persons — those residing in institutions and group homes as well as those residing at home. In overruling the district court's holding that the city's action violated the Fourteenth Amendment's equal protection and substantive due process guarantees, the Third Circuit relied upon *Cleburne* in applying a rational basis or minimum scrutiny analysis. The city justified its action by claiming that "those living in group homes are totally dependent on Philadelphia and the Commonwealth for their care and thus are more likely to require institutionalization should their services be diminished."[25] The circuit court concluded that the city's action was rationally related to its legitimate interest in maintaining the integrity of its mental retardation services program.[26]

In accord with this reasoning, as a general proposition — excluding the areas of education and employment — persons with disabilities do not have any particular constitutional protections as distinct from other members of society at large.

III. Education

The seminal case addressing constitutional rights in the area of education was *Brown v. Board of Education.*[27] In that case, black children[28] sought admission to public schools that only permitted enrollment of white children. In overruling the "separate but equal" doctrine established in *Plessy v. Ferguson,*[29] the Supreme Court declared: "We conclude that in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[30] The Court described the importance of education when it stated:

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[24] 874 F.2d 156 (3d Cir. 1989).

[25] 874 F.2d at 163.

[26] 874 F.2d at 164-65.

[27] 347 U.S. 483, 74 S. Ct. 686 (1954).

[28] The Supreme Court used the term "minors of the Negro race. . . ." 347 U.S. at 487, 74 S. Ct. at 688.

[29] 163 U.S. 537, 16 S. Ct. 1138 (1896). The "separate but equal" doctrine permitted segregation — such as separate schools for black students and for white students — as long as the separate facilities, such as schools, were purportedly of similar calibre.

[30] 347 U.S. at 495, 74 S. Ct. at 692.

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[31]

In finding segregation inherently unequal, the Court agreed that

> [s]egregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.[32]

Although the Supreme Court's opinion in *Brown* may have been construed as establishing education as a fundamental right and thereby calling for strict scrutiny under the Fourteenth Amendment, the Court's decision in *Goss v. Lopez*[33] clarified that *Brown* did not so hold. In *Goss*, the Supreme Court ruled that minimum due process is required under the Fourteenth Amendment before a student may be suspended from school for up to 10 days. The Court concluded that since the Ohio state law at issue directed local governmental authorities to provide a free education to all residents between the ages of 5 and 21, and since that state law provided for compulsory school attendance, all students had an entitlement to a public education.[34] The Supreme Court stated:

> Although Ohio may not be constitutionally obligated to establish and maintain a public school system, it has nevertheless done so and has required its children to attend. Those young people do not "shed their constitutional rights" at the schoolhouse door.[35]

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[31] 347 U.S. at 493, 74 S. Ct. at 691.

[32] 347 U.S. at 494, 74 S. Ct. at 691.

[33] 419 U.S. 565, 95 S. Ct. 729 (1975).

[34] 419 U.S. 565, 573, 95 S. Ct. 729, 735 (1975).

[35] 419 U.S. at 574, 95 S. Ct. at 736, citing *Tinker v. Des Moines School District*, 393 U.S. 503, 506, 89 S. Ct. 733, 736 (1969).

The Court also opined that

> Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred.[36]

The legal responsibilities placed upon the state to fulfill its due process obligations include the responsibility

> . . . to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.[37]

The minimum procedures required by the Court include notice and at least an informal hearing prior to imposing a suspension,[38] unless urgent circumstances preclude sufficient time within which to provide a prior notice and hearing. In that event, the notice and hearing must be provided as soon as practicable after the suspension commences.[39]

Another significant case in which the Supreme Court addressed the interplay between the Fourteenth Amendment and education is *San Antonio Independent School District v. Rodriguez*.[40] That case involved a class action on behalf of Mexican-American school children alleged to be members of poor families residing in school districts having a low property tax base. The system for financing education in Texas was based largely on funds provided to school districts from the state but included supplemental funds raised by local school district property taxes. The district court found the Texas school finance system unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.[41] That court based its decision upon findings that wealth is a suspect classification and education is a fundamental right under the Constitution. The Supreme Court disagreed, and held that neither a suspect classification nor a fundamental right was involved.[42]

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[36] 419 U.S. at 574, 95 S. Ct. at 736.

[37] *Id.*

[38] 419 U.S. 565, 579, 95 S. Ct. 729, 738-39 (1975). The Court also stated that ". . . suspensions [for more than 10 days] or expulsions for the remainder of the school term, or permanently, may require more formal procedures." 419 U.S. 565, 584, 95 S. Ct. 729, 741 (1975).

[39] 419 U.S. 565, 582-83, 95 S. Ct. 729, 740 (1975).

[40] 411 U.S. 1, 93 S. Ct. 1278 (1973).

[41] 337 F. Supp. 280 (W.D. Tex. 1971).

[42] 411 U.S. 1, 18, 93 S. Ct. 1278, 1288 (1973).

In so holding, the Court first reviewed the precedents in which wealth was held suspect. According to the Court, such cases involved

> . . . individuals, or groups of individuals, who . . . shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.[43]

In holding that the plaintiffs were not entitled to strict scrutiny review of classifications based on disparities in wealth, the Court stated:

> Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it, a sufficient answer to [plaintiffs'] argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.[44]

The Court held that

> [t]he system of alleged discrimination and the class it defines have none of the traditional indicia of suspectedness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.[45]

The Court then turned to the question of whether education is a fundamental right, and found neither an explicit nor implicit protection in the Constitution for education.[46] The Court held that the tax scheme at issue did not infringe upon fundamental First Amendment rights. The Court concluded that relative differences in spending levels involve qualitative issues and that no valid claim could be made that children were being deprived of the opportunity to "acquire the basic minimal skills necessary for the enjoyment of the rights of speech and a full participation in the political process."[47]

In upholding the Texas financing scheme in *Rodriguez*, the Court also noted that the state funds were intended to extend and improve the quality of public education.[48] Further, the Court expressed concern about applying a strict-scrutiny standard to education that could result in the judiciary imposing inflexible and uninformed constitutional restraints in matters involving complex fiscal and educational issues. The Court did not want to impede research and experimentation it considered "vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions."[49] Accordingly, the Supreme Court analyzed the funding scheme applied by the State of Texas under the "rational basis" test and held that the scheme complied with the Equal Protection Clause of the Fourteenth Amendment because it was premised on the legitimate state interest in "assuring a basic education for every child [and encouraging] participation in and control of each district's schools at the local level."[50]

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[43] 411 U.S. at 20, 93 S. Ct. at 1290, referencing: *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585 (1956) (indigent criminal defendant has a right to a transcript at no cost); *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814 (1963) (indigent criminal defendants have a right to court-appointed counsel); *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018 (1970) (a criminal defendant may not be incarcerated due to his inability to pay a fine).

[44] 411 U.S. at 23-24, 93 S. Ct. at 1291 (footnotes omitted).

[45] 411 U.S. at 28, 93 S. Ct. at 1294.

[46] 411 U.S. 1, 35, 93 S. Ct. 1278, 1297 (1973).

[47] 411 U.S. at 37, 93 S. Ct. at 1299.

In contrast to *Rodriguez*, the Supreme Court struck down a state law in *Plyler v. Doe*[51] that withheld state funds from local school districts for education of children who were not legally admitted into the United States. In so ruling, the Court relied in large part upon the importance of education. The Court stated that

> some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.[52]

The Court further explained that

> education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.
>
> In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. . . . But more directly, "education prepares individuals to be self-reliant and self-sufficient participants in society." . . . The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the

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[48] 411 U.S. at 39, 93 S. Ct. at 1299.

[49] 411 U.S. at 41-43, 93 S. Ct. at 1301-02.

[50] 411 U.S. 1, 49, 93 S. Ct. 93, 1305.

[51] 457 U.S. 202, 102 S. Ct. 2832 (1982).

[52] 457 U.S. at 221, 102 S. Ct. at 2397, citing *Wisconsin v. Yoder*, 406 U.S. 205, 221, 92 S. Ct. 1526, 1536 (1972).

> principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.[53]

Although the Court failed to find that plaintiffs in *Plyler* constituted a suspect class or that education was a fundamental constitutional right, the Court nonetheless implicitly applied a heightened scrutiny standard when it held that "the discrimination contained in [the state law] can hardly be considered rational unless it furthers some *substantial* goal of the State."[54]

Thus, although the Supreme Court has never specifically addressed the constitutional right to an education of children with disabilities, the Court's pronouncements in *Brown v. Board of Education* and *Plyler v. Doe* concerning the importance of education would seem applicable. The due process rights of students established in *Goss v. Lopez* appear equally applicable.

At least two lower courts have addressed the question of what constitutional rights are applicable to students with disabilities — *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*[55] and *Mills v. Board of Education*.[56] These two cases recognized constitutional principles that have since been embodied in the Education for All Handicapped Children Act.

In *PARC*, mentally retarded children sued the state, claiming that they were denied the right to a public education. The suit was based upon three claims: (1) a violation of due process because there was no notice or hearing provided before retarded children were excluded from public education or their educational assignments were changed; (2) a violation of equal protection due to the lack of a rational basis for assuming that mentally retarded children were uneducable and untrainable; and (3) a violation of due process because it was arbitrary and capricious to deny mentally retarded children a right to the education guaranteed by state law. The parties in *PARC* entered into an interim stipulation which basically provided

> that no child who is mentally retarded or thought to be mentally retarded can be assigned initially (or re-assigned) to either a regular or special educational status, or excluded from a public education without a prior recorded hearing before a special hearing officer. At that hearing, parents have the right to representation by counsel, to examine their child's records, to compel the attendance of school officials who may have relevant evidence to offer, to

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[53] 457 U.S. at 221-222, 102 S. Ct. at 2397.

[54] 457 U.S. at 224, 102 S. Ct. at 2398 (emphasis added). As previously noted [*see* text to notes 2-7 of this chapter, *supra*], under the rational basis test the government must simply show that the classification applied is rationally related to a legitimate state interest. Under the intermediate scrutiny test, however, the government must show that the classification applied is substantially related to a sufficiently important governmental interest.

[55] 343 F. Supp. 279 (E.D. Pa. 1972).

[56] 348 F. Supp. 866 (D.D.C. 1972).

> cross-examine witnesses testifying on behalf of school officials and to introduce evidence of their own.[57]

Thereafter, a consent agreement was submitted to the court providing that "it is the Commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity."[58]

Although the *PARC* court did not rule that the inclusions in the stipulation and consent agreement were constitutionally mandated, the court did have occasion to determine whether such claims were viable. The plaintiffs in *PARC* constituted a class (composed of mentally retarded persons), as did the defendants (composed of all school districts within the state). Some school districts objected to the agreement reached between the representatives of the two classes. The objecting school districts challenged the court's jurisdiction over the case, which required the court to satisfy itself that the plaintiffs' claims were not insubstantial or frivolous. Accordingly, the district court in *PARC* found that the plaintiffs possessed colorable claims[59] under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[60]

The second case, *Mills*, involved students with disabilities—labelled mentally retarded, emotionally disturbed, hyperactive or as having behavior problems — who were denied admission to, or excluded from, the public school system. The defendants admitted that they had a duty to provide disabled students with a publicly supported education suited to each child's needs, as well as a constitutionally proper prior hearing and periodic program reviews.[61] The defendants' admission — like the agreements in *PARC* — obviated the necessity for the court to actually rule on the plaintiffs' constitutional claims. Since the plaintiffs claimed that the defendants failed to comply with court orders and agreements between the parties, however, the plaintiffs applied for, and were granted, summary judgment. The summary judgment granted by the district court provided in part:

> (1) That no child eligible for a publicly supported education . . . shall be excluded from a regular public school assignment . . . unless such child is provided (a) adequate alternative educational services suited to the child's needs, which may include special education or tuition grants, and (b) a constitutionally adequate prior hearing and periodic review of the child's status, progress, and the adequacy of any educational alternative. . . .

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[57] 343 F. Supp. at 303-05.

[58] 343 F. Supp. at 307. This language is the forerunner to the free appropriate public education (FAPE) guarantee to every handicapped child under the EAHCA.

[59] A colorable claim is one that appears on the surface to have merit and that is thus not a frivolous claim.

[60] 343 F. Supp. at 295.

[61] 348 F. Supp. 866 (D.D.C. 1972).

> (3) The District of Columbia shall provide to each child of school age a free and suitable publicly-supported education regardless of the degree of the child's mental, physical or emotional disability or impairment. Furthermore, defendants shall not exclude any child resident in the District of Columbia from such publicly-supported education on the basis of a claim of insufficient resources.[62]

Thus, as the *Mills, PARC* and *Goss* cases illustrate, the constitutional rights and protections extended by the Equal Protection and Due Process Clauses of the Fourteenth Amendment are considerably greater in the area of education than in many other areas of human activity. Moreover, the limited case law on point reflects strong protections for students with disabilities.

IV. Employment

An employee or applicant for employment who claims a violation of the Equal Protection Clause of the Fourteenth Amendment must show: (1) that the government has taken action based upon an impermissible classification;[63] or (2) that he or she has been denied a fundamental constitutional right to employment. On the other hand, to establish a violation of the Due Process Clause of the Fourteenth Amendment in an employment context, a plaintiff must prove that he or she suffered a deprivation of a constitutionally required procedural right or that the government has applied a constitutionally inadequate rationale for its action.[64]

A. Equal Protection

As previously explained, a disabled employee or applicant for employment will not succeed on a claim that, on the basis of his or her disability, he or she is a member of a constitutionally suspect class.[65] A member of a non-suspect class — such as a disabled person — can obtain strict scrutiny or heightened scrutiny review under the Equal Protection Clause only by showing a violation of a constitutionally fundamental right. Under the prevailing view, courts do not consider employment to be a fundamental right.

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[62] 348 F. Supp. at 878.

[63] As previously noted, when governments make classifications that distinguish between people on the basis of race or national origin (or sometimes alienage), the strict scrutiny test must be satisfied. When governments make classifications that distinguish between people on the basis of sex or sometimes alienage, the heightened scrutiny test must be satisfied. When governments make classifications on any other basis, the rational basis test must be satisfied.

[64] *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2717 (1972).

[65] *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S. Ct. 3249 (1985).

By way of example, in *Koelfgen v. Jackson*[66] a class action was brought to challenge a state's veterans preference law. One subsection of the statute at issue granted an absolute preference to armed services veterans for initial job appointments, while another subsection permitted a bonus to be added to test scores for veterans taking promotional examinations. The plaintiffs claimed that the different treatment afforded veterans violated the rights of non-veterans to equal protection of the law under the Fourteenth Amendment. The court summarized the law of equal protection as follows:

> The general rule is that great latitude is allowed legislatures in making classifications in social and economic legislation. . . . However, when a statutory classification is either based upon "suspect criteria" or affects a "fundamental right," the burden of proof shifts and such a classification will be held to deny equal protection unless it can be justified by a "compelling governmental interest."[67]

The court in *Koelfgen* held that the right to be fairly considered for public employment is not a fundamental right. To qualify as such, a right must be established by the Constitution.[68] The court was unable to find any evidence in the Constitution indicating a right to be fairly considered for public employment. In the absence of a suspect classification or fundamental right, the court was required to apply a rational basis test. Under that test the court determined that the different treatment accorded veterans was not irrationally based.

B. Due Process

Two Supreme Court decisions handed down on the same day (with differing results) help define the scope of protection provided by the Due Process Clause of the Fourteenth Amendment in the area of employment. In the first case, *Board of Regents v. Roth*,[69] the plaintiff was hired as an assistant professor at a state university for the fixed term of one academic year. Although it was undisputed that the plaintiff had no tenure right to continued employment, the plaintiff alleged a violation of his First Amendment right of free speech, based on his claim that he was not retained due to his criticism of the university administration. The plaintiff also alleged a violation of his procedural due process rights because the university failed to advise him of the reason for its decision to not continue his employment.

The Court held in *Roth* that the plaintiff did not have a constitutional right to receive either a statement of reasons or a hearing concerning the university's decision not to rehire him. The Court stated:

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[66] 355 F. Supp. 243 (D.C. Minn. 1972), *aff'd*, 410 U.S. 976, 93 S. Ct. 1502 (1973).

[67] 355 F. Supp. at 249-50 (footnote omitted).

[68] *Id.* at 250.

[69] 408 U.S. 564, 92 S. Ct. 2701 (1972).

> The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property.[70]

The Court found that the plaintiff had no property interest since he had no contractual right to re-employment for the next year.[71] In addition, the Court found no violation of a liberty interest.[72]

In the second case, *Perry v. Sindermann*,[73] the plaintiff had worked for the state college system for a total of ten years — as a professor at a state junior college for the last four, under a series of one-year contracts, and as an employee of the system for six years prior to that. The plaintiff in *Perry*, like the plaintiff in *Roth*, claimed that the decision not to rehire him for the next academic year was based upon an impermissible infringement of his right to freedom of speech. More specifically, the plaintiff alleged that he was not rehired due to his public criticism of the college administration. He also claimed a violation of his procedural due process rights because he was not afforded a hearing prior to being denied retention.

The district court in *Perry* granted summary judgment to the governmental employer. Consequently, for the purposes of the Supreme Court's analysis on appeal, the plaintiff's allegations were required to be considered in the light most favorable to him.[74] Accordingly, the Court treated as true the plaintiff's allegation that although there was not a formal contractual tenure provision applicable to his employment, there was a *de facto* tenure program established by college and state university system guidelines and past practice. The Court declared:

> Just as this Court has found there to be a "common law of a particular industry or of a particular plant" that may supplement a collective-bargaining agreement, . . . so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure. . . . In this case, the respondent has alleged the existence of rules and understandings,

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[70] 408 U.S. at 569, 92 S. Ct. at 2705.

[71] 408 U.S. at 578, 92 S. Ct. at 2709-10.

[72] 408 U.S. at 573, 575, 92 S. Ct. at 2707, 2708. The court stated: "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. . . . Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. . . . It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." 408 U.S. at 573-575, 92 S. Ct. at 2707-08 (footnote omitted).

[73] 408 U.S. 593, 92 S. Ct. 2694 (1972).

[74] Summary judgment is available to a litigant if there is no dispute concerning the essential facts and the applicable law, based on those facts, warrants a determination in favor of that party. For the purposes of a summary judgment motion, a court is required to consider the facts in the light most favorable to the party defending the motion.

> promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent "sufficient cause.". . . [W]e agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of "the policies and practices of the institution."[75]

Of course, if the plaintiff were able to prove the existence of a property interest, this would not end the matter. As described by the Court:

> Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency.[76]

The lesson of *Roth* and *Sindermann* is that terminated employees have no due process rights if they have no right or interest under state law to continued employment. Employees do have due process rights, however, if they have a state law right to continued employment or the right to continued employment unless sufficient cause is shown. The scope of such due process rights includes the right to notification of the grounds for non-retention and an opportunity to challenge the sufficiency or legitimacy of the basis for non-retention.

C. Irrebuttable Presumption

An employee may successfully claim a violation of due process when his or her right to employment is impaired by application of an irrebuttable presumption — a presumed fact or set of facts that, although not necessarily true, is held unassailable by the employer. By way of example, in *Cleveland Board of Education v. LaFleur*[77] the Supreme Court struck down mandatory maternity leave policies in two different school districts. In one school district pregnant school teachers were required to take maternity leave without pay beginning five months before the expected birth of a child; in the second school district the same procedure was applicable four months prior to the expected birth of the child. The Court applied heightened scrutiny in this case, at least in part because it involved a fundamental interest protected by the Constitution: the liberty interest in marriage and family life.[78] The Court stated:

> By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the

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[75] 408 U.S. at 602-03, 92 S. Ct. at 2700 (footnote omitted).

[76] 408 U.S. at 603, 92 S. Ct. at 2700.

[77] 414 U.S. 632, 94 S. Ct. 791 (1974).

[78] 414 U.S. at 639-40, 94 S. Ct. at 796.

> exercise of these protected freedoms. . . . [T]he Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty.[79]

The school boards offered two explanations for the mandatory maternity leave rules. First they contended that the firm cutoff dates were necessary to maintain continuity of classroom instruction. Second, they argued that at least some teachers become physically incapable of adequate performance during the latter part of pregnancy, and, thus, by having an early cutoff the districts could ensure the physical capability of classroom instructors. The Court rejected the first argument for the reason that as long as early notice of pregnancy and expected birth dates is provided, continuity of classroom instruction could be just as well served with a much later cutoff date and a later firm date would impose a much lesser burden on the women's exercise of constitutionally protected freedoms.[80] In rejecting the second explanation — the need to ensure physical capability of instructors — the Court found the school districts to have used a constitutionally impermissible irrebuttable presumption. The Court opined that

> the provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. . . . The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary.[81]

The Court also found the school board's rule prohibiting a teacher from returning to work until the beginning of the next regular school semester following the date at which the child attains the age of three months, to contain an impermissible irrebuttable presumption. The Court held:

> To the extent that the three-month provision reflects the school board's thinking that no mother is fit to return until that point in time, it suffers from the same constitutional deficiencies that plague the irrebuttable presumption in the termination rules.[82]

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[79] 414 U.S. at 640, 94 S. Ct. at 796.

[80] 414 U.S. at 643, 94 S. Ct. at 798.

[81] 414 U.S. at 644, 94 S. Ct. at 798. The Court relied upon the concept of an irrebuttable presumption, which it had previously established in non-employment contexts. It relied upon *Vlandis v. Klein*, 412 U.S. 441, 93 S. Ct. 2230 (1973) (holding unconstitutional a state statute mandating an irrebuttable presumption of non-residency for the purposes of qualifying for reduced tuition rates at a state university), and *Stanley v. Illinois*, 405 U.S., 645, 92 S. Ct. 1208 (1972) (holding that a state statute containing an irrebuttable presumption that unmarried fathers are incompetent to raise their children violated the due process clause).

[82] 414 U.S. at 648, 94 S. Ct. at 800-01.

The broad sweep of the Supreme Court's language in *LaFleur* was circumscribed by the Court in its later decision in *Weinberger v. Salfi*.[83] In that case a widow sued on her own behalf and that of her child by a previous marriage for social security insurance benefits allegedly due them as a result of her husband's death. The plaintiff challenged a Social Security Act provision prohibiting a wage earner's widow or step-child from receiving insurance benefits unless their relationships to the wage earner had existed for more than nine months prior to the wage earner's death. The Court recognized that the social security rule was interposed for the purpose of avoiding payments to spouses of sham relationships. Although the Court acknowledged that the irrebuttable presumption rule described in *LaFleur* was applied because the legislation in question presumed a fact that was not necessarily or universally true, the Court nonetheless upheld the rule. The Court described the limitations imposed by the Due Process Clause as follows:

> . . . the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.[84]

The Court described the extent of equal protection coverage as follows:

> A statutory classification in the area of social welfare is consistent with the Equal Protection Clause of the Fourteenth Amendment if it is rationally based and free from invidious discrimination.[85]

The Court distinguished *LaFleur* as involving a contractual or property interest to receive benefits or funds, from *Salfi*, which involved a "noncontractual claim to receive funds from the public treasury."[86] The Court thus held that

> The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule. We conclude that the duration-of-relationship test meets this constitutional standard.[87]

At least one court has had to determine — in an employment case involving a person with a disability — where *LaFleur* leaves off and *Salfi* takes over. In that case (*Gurmankin v. Costanzo*),[88] a blind woman was denied the opportunity to student teach in a non-special education class in the City of Philadelphia and was later denied employment as a regular education teacher in that school district. Although the plaintiff (the blind teacher) brought a discrimination claim under Section 504 of the Rehabilitation Act,[89] she also claimed a violation of equal protection and due process. The district court addressed the constitutional issues because it found a denial of the plaintiff's rights dating back to a time prior to enactment of Section 504.

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[83] 422 U.S. 749, 95 S. Ct. 2457 (1975).

[84] 422 U.S. at 768, 95 S. Ct. at 2468, quoting *Flemming v. Nestor*, 363 U.S. 603, 611, 80 S. Ct. 1367, 1373 (1960).

[85] 422 U.S. at 770, 95 S. Ct. at 2469 (footnote omitted), quoting from *Richardson v. Belcher*, 404 U.S. 78, 81, 92 S. Ct. 254, 257 (1971).

[86] 422 U.S. at 772, 95 S. Ct. at 2470.

[87] 422 U.S. at 777, 95 S. Ct. at 2472-73.

In struggling to reconcile *LaFleur* and *Salfi* in *Gurmankin*, the district court opined:

> Confronted with these two seemingly inconsistent opinions, I believe that *LaFleur* is the more appropriate precedent. Ms. Gurmankin's interest in public employment, though it may not be a "fundamental right," is certainly more important than the "right" to receive social security benefits in [*Salfi*]. In addition, Ms. Gurmankin's blindness permanently sets her apart from other people in a way that may cause her to be treated differently from other people in every activity she attempts to engage in. . . . Most importantly, the decision in [*Salfi*] to a great extent was based on the administrative difficulty and expense of having individual determinations of the genuineness of marital relationships. . . . The administrative concerns cited by the Court in [*Salfi*] simply are not present in the instant case.[90]

Accordingly, the district court concluded:

> Given Ms. Gurmankin's interest in obtaining employment and the insignificance of the burdens that would be placed on the school district if it allowed blind persons an opportunity to demonstrate their competence, I find that the Philadelphia School District's policy of refusing to consider blind persons to be teachers for sighted students created an irrebuttable presumption in violation of the plaintiff's due process rights.[91]

Gurmankin, therefore, may be cited by disabled job applicants for the proposition that a prospective employer with a concern relative to an applicant's disability — as indicating an inability to perform the essential elements of a job — must provide the disabled applicant an opportunity to explain how he or she would compensate for, or overcome, such disability.

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[88] 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977).

[89] 29 U.S.C.A. §794 (West Supp. 1990). *See* chapters 3-8 of this text, *infra*, for a detailed discussion of this legislation.

[90] 411 F. Supp. at 990-91.

[91] 411 F. Supp. at 991-92. The Court also noted that because it was basing its decision on the due process reasoning of *LaFleur*, it did not consider Ms. Gurmankin's equal protection arguments. 411 F. Supp. at 992, n.8.

The constitutional rights thus available to disabled applicants for employment are limited to violations of equal protection — involving improper classifications based on race, alienage, national origin and sex — or violations of due process — involving reliance on an irrebuttable presumption. The Constitution offers actual employees similar protections under the Equal Protection and Due Process Clauses, as well as the additional due process rights to an explanation and informal hearing before a termination of employment when the employee has a property interest in continued employment.

V. Summary

In most cases disabled people have obtained little relief when seeking to utilize constitutional means to redress discriminatory conduct — in both employment and non-employment contexts. Constitutional claims that are premised on equal protection and due process theories will only rarely provide relief for disabled persons due to the lack of suspect class status or of a fundamental right. Accordingly, the federal statutes enacted specifically to assist disabled people in avoiding discrimination and entering the mainstream of society, which are discussed in the remaining chapters of this text, are of crucial importance.

3

Section 504 of the Rehabilitation Act: Introduction and Procedural Issues

I. Introduction

Section 504 of the Rehabilitation Act provides, in pertinent part, as follows:

> No otherwise qualified individual with handicaps in the United States, as defined in section 7(8) [29 U.S.C. §706(8)], shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. . . .[1]

This Section prohibits recipients of federal financial assistance from discriminating on the basis of handicap in numerous aspects of life, including employment, education, architectural accessibility, and health, welfare and social services. Section 504 constituted the first national declaration of the rights of disabled people. The purpose of Section 504 was stated as being to "firmly establish the rights of [disabled] Americans to dignity and self-respect as equal and contributing members of society, and to end the virtual isolation of millions of children and adults from society."[2] When enacting Section 504, Congress "made a commitment to the handicapped that, to the maximum extent possible, they shall be fully integrated into the mainstream of life in America."[3]

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[1] 29 U.S.C.A. §794 (West Supp. 1990). The statute further provides:

> The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees. *Id.*

Enacted in 1973, Section 504 required the head of each federal executive agency to promulgate regulations necessary to carry out the Act's purposes.[4] It was not until January 13, 1978, however, that the United States Department of Health, Education and Welfare (HEW)[5] published the first regulations containing general minimum standards for the enforcement of Section 504 in the *Federal Register*.[6] The HEW regulations were promulgated only as a result of a 1976 lawsuit. In *Cherry v. Matthews*,[7] after a complaint was filed protesting the government's failure to promulgate regulations under the Act, the court held that the Secretary of HEW was required to promulgate regulations effectuating Section 504 since "[t]he statute's discrimination prohibitions were certainly not intended to be self-executing. Reports from the Senate and House . . . indicate that Congress contemplated swift implementation of Section 504 through a comprehensive set of regulations."[8] Subsequent to the publication of HEW's regulations in 1978, at least 55 federal executive agencies promulgated regulations governing the enforcement of Section 504 with respect to programs or activities receiving federal financial assistance from their agency.[9]

Section 504 has been the subject of much litigation. To a large extent, such litigation has involved disputes about the key elements or terms in the statute. The statute prohibits "otherwise qualified" individuals who are "handicapped" from being discriminated against "solely on the basis of handicap" by any "program or activity" receiving "federal financial assistance." The primary issues of dispute under Section 504 concern the meaning of those specific terms. Other frequently litigated issues under Section 504 have involved procedural questions, the correct interpretation of the various regulations promulgated under the Act, and the remedies that may be obtained under the Act. Each of these issues will be discussed in this text.

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[2] 118 *Cong. Rec.* 32,310 (1972) (statement of Sen. Williams).

[3] S. Rep. No. 890, 95th Cong., 2d Sess. 39 (1978).

[4] *See* note 1 of this chapter, *supra*.

[5] HEW was subsequently divided into the Department of Health and Human Services (DHHS) and the Department of Education (DOE).

[6] These regulations are codified at 45 C.F.R. Part 84.

[7] 419 F. Supp. 922 (D.D.C. 1976).

[8] 419 F. Supp. at 924.

[9] For a comprehensive listing of the Section 504 regulations promulgated by the individual federal agencies, *see* appendix B of this text.

II. Procedural Issues

A. Private Right of Action

Although Section 504 provides that the various Offices of Civil Rights within each of the federal executive agencies (through the United States Department of Justice) may file suit against a recipient of federal financial assistance to enforce Section 504, the statute does not specifically provide that a private individual has the right to do so. The circuit courts that have addressed this question, however, are virtually unanimous in their view that a private right of action is available under Section 504.[10] The Supreme Court implicitly ruled on the question, at least in the employment context, in holding in *Consolidated Rail Corp. v. Darrone*[11] that "we think it clear that [Section] 504 authorizes a plaintiff who alleges intentional discrimination to bring an equitable action for back pay."[12]

Moreover, in 1978 Congress amended the Rehabilitation Act to provide that the remedies, procedures and rights set forth in Title VI of the Civil Rights Act apply with respect to actions under Section 504.[13] At the time of that amendment the federal courts had recognized a private right of action under Title VI. Subsequently, in *Guardians Association v. Civil Service Commission*[14] the majority of the Supreme Court agreed that a private right of action may be inferred under Title VI. Additionally, the 1978 amendments to the Rehabilitation Act provide that attorneys' fees may be awarded to the prevailing party in an action under Section 504.[15] The Supreme Court held in *Cannon v. University of Chicago*[16] that statutory authorization of attorneys' fees "explicitly presumes the availability of private suits to enforce" Title IX[17] (which was the statute at issue in *Cannon*). The same reasoning seems applicable to Section 504.

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[10] *See, e.g., Cousins v. Secretary of Transportation*, 857 F.2d 37 (1st Cir. 1988), *rehearing*, 880 F.2d 603 (1st Cir. 1989); *Pushkin v. Regents of University of Colorado*, 658 F.2d 1372 (10th Cir. 1981); *Doe v. New York University*, 666 F.2d 761, 774 (2d Cir. 1981); *Kling v. County of Los Angeles*, 633 F.2d 876 (9th Cir. 1980); *Rogers v. Frito-Lay*, 611 F.2d 1074 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980); *Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1980), *vacated and remanded as moot*, 451 U.S. 390 (1981); *NAACP v. Medical Center, Inc.*, 599 F.2d 1247 (3d Cir. 1979); *Doe v. Colautti*, 592 F.2d 704 (3d Cir. 1978); *Davis v. Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397 (1979); *Leary v. Crapsey*, 566 F.2d 863 (2d Cir. 1977); *Kampmeiler v. Nyquist*, 553 F.2d 296 (2d Cir. 1977); *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977); *United Handicapped Federation v. Andre*, 558 F.2d 413 (8th Cir. 1977).

[11] 465 U.S. 624, 104 S. Ct. 1248 (1984).

[12] 465 U.S. at 630, 104 S. Ct. at 1252.

[13] 29 U.S.C.A. §794a (West Supp. 1990).

[14] 463 U.S. 582, 103 S. Ct. 3221 (1983).

[15] 29 U.S.C.A. §794a (West Supp. 1990).

[16] 441 U.S. 677, 99 S. Ct. 1946 (1979).

[17] 441 U.S. at 699, 99 S. Ct. at 1959.

At one point, several courts had held that a disabled person could file a private employment discrimination suit under Section 504 only if the primary objective of the federal financial assistance received by the employer was to provide employment.[18] Those decisions were premised on the following reasoning: Section 505 of the Rehabilitation Act provides that the remedies, procedures and rights set forth in Title VI of the Civil Rights Act apply to actions under Section 504.[19] Section 604 of Title VI provides that an employee can bring an employment discrimination action under Title VI only if the primary purpose of the federal financial assistance received by the employer is to provide employment.[20] By analogy, therefore, the same rule should apply in Section 504 cases. In *Consolidated Rail Corporation v. Darrone*, however, the Supreme Court disagreed with that position.[21] The Court held that Section 504 was primarily intended to prevent employment discrimination against handicapped people, and that that purpose should not be limited to programs that receive federal aid primarily intended to promote employment.

Accordingly, it seems clear that private individuals may sue a recipient of federal financial assistance to enforce Section 504. A more difficult question, however, arises when a private individual, rather than filing suit against the recipient of federal financial assistance, wants to sue the federal agency that funds the recipient based on the agency's purported failure to investigate or review decisions relating to Section 504 complaints. In several cases such actions against federal agencies have been held prohibited. In *Salvador v. Bell*[22] the court opined that obtaining direct relief from the funding agency that allegedly failed to *enforce* Section 504, as opposed to obtaining direct relief from the recipient of federal financial assistance who purportedly violated Section 504, is inconsistent with the overall framework of the Act.[23] And, in *Eastern Paralyzed Veterans Association of*

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[18] *See, e.g., Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979); *Zorick v. Tynes*, 372 So. 2d 133 (D. Fla. 1979); *United States v. Cabrini Medical Center*, 639 F.2d 908 (2d Cir. 1981); *Carmie v. Metropolitan St. Louis Sewer District*, 620 F.2d 672 (8th Cir.), *cert. denied*, 449 U.S. 892 (1980); *Simpson v. Reynolds Metals Company*, 629 F.2d 1226 (7th Cir. 1980); *Brinkley v. Department of Public Safety*, 22 Fair Empl. Prac. Cas. (BNA) 164 (N.D. Ga. 1980).

[19] 29 U.S.C.A. §794a (West Supp. 1990).

[20] 42 U.S.C.A. §2000d-3 (1981).

[21] 465 U.S. at 631-35, 104 S. Ct. at 1253-54.

[22] 622 F. Supp. 438 (N.D. Ill. 1985), *aff'd*, 800 F.2d 97 (7th Cir. 1986).

[23] The reasoning of *Salvador v. Bell* was followed in *Marlow v. U.S. Department of Education*, 820 F.2d 581 (2d Cir. 1987), *cert. denied*, 484 U.S. 1044 (1988). In that case the court refused to allow a plaintiff to file an action against the Department of Education's Office for Civil Rights (OCR) to compel OCR to reopen the plaintiff's complaint and issue an order allowing the plaintiff to rebut OCR's finding that he was not otherwise qualified to serve as a high school English teacher.

Pennsylvania, Inc. v. Southeastern Pennsylvania Transportation Authority[24] the court held that Section 504 does not create a private right of action for a disabled person to compel a federal agency to withhold federal funds from an allegedly non-complying recipient.[25]

In *Greater Los Angeles Council on Deafness, Inc. v. Baldrige*,[26] however, representatives of a class of deaf and hearing-impaired persons filed an action under Section 504 against the United States Secretary of Commerce to compel the Department of Commerce to: (1) rule on an administrative complaint alleging that a public television station was discriminating against hearing-impaired people, and (2) require television stations receiving federal funding to caption their television programs for deaf and hearing-impaired viewers — which was the basis of the plaintiffs' discrimination complaint. The court held that because the Department of Commerce regulations required the department to investigate Section 504 complaints, which the department had failed to do, the plaintiffs could file a mandamus action to compel such an investigation. The court declined to permit a mandamus action to compel closed captioning of television programs until such time as the agency investigated the complaint as required. The court implied that in the event the agency investigated the complaint and declined to take action thereon, a mandamus action to compel closed captioning would be permissible.[27]

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[24] No. 85-4460, slip op. (E.D. Pa. October 2, 1986) (available on Lexis genfed library). Similarly, in *Cousins v. Secretary of the U.S. Department of Transportation*, 880 F.2d 603 (1st. Cir. 1989) (en banc), the court held that a disabled plaintiff could not sue the federal Department of Transportation under Section 504 to compel the department to review action taken by its agency. The court held that the plaintiff already had a right to judicial review under the Administrative Procedure Act, 5 U.S.C. §§701-706, and that, therefore, Section 504 did not provide a private right of action against the government as a "regulator." 880 F.2d at 605. *See also, Kent v. Illinois*, No. 86 C 4526, slip op. (N.D. Ill. March 31, 1987) (available on Lexis genfed library) ("[i]n the context of employment discrimination an employee may only invoke [Section] 504 to sue his employer — not the federal agency that provides funds to that employer").

[25] Another case discussing the issue of whether a private individual may sue a federal agency under Section 504 is *Doe v. Attorney General of the United States*, 723 F. Supp. 452 (N.D. Cal. 1989). The plaintiff in that case was a physician at a clinic that administered physical examinations to applicants for employment at the Federal Bureau of Investigation (FBI). After learning that the physician had contracted AIDS, the FBI ceased sending applicants to the clinic. The physician sued the FBI, claiming that since his employer (the clinic) received federal assistance, as a provider of services to a federal agency (the FBI) he was entitled to the protection of Section 504. The court held, however, that there was no legislative or judicial basis to allow an employer of a federal supplier to file suit against a federal agency.

[26] 827 F.2d 1353 (9th Cir. 1987).

[27] At least one court has held that a plaintiff may assert a cause of action against a corporation's employees and officers who were allegedly responsible for company policies that violated Section 504. In *Chaplin v. Consolidated Edison Co.*, 587 F. Supp. 519 (S.D.N.Y. 1984), the court held that employees and officers of Consolidated Edison could be sued in their individual capacities under Section 504. The court recognized that Section 504 only prohibits discrimination against handicapped persons by

B. Exhaustion of Administrative Remedies

It is widely recognized that Section 504 complainants need not exhaust their administrative remedies prior to filing suit under Section 504, because the administrative procedures do not provide any direct relief to individual victims.[28] The only remedy available via Section 504 administrative proceedings against a recipient of federal financial assistance is termination, suspension or deferment of the federal assistance.[29] That remedy, rather than helping a disabled person who claimed discrimination under Section 504, would in fact harm that individual, since a cutoff of the recipient's federal financial assistance would remove the disabled person's ability to invoke the non-discrimination mandate of Section 504. Further, to the extent the individual was receiving some, albeit inadequate, services, discontinuation of federal funds might result in termination of those services to the individual.

The Section 504 administrative procedures do not allow individual disabled complainants to participate in the administrative hearings. The only parties to such proceedings are the recipient and the governmental agency responsible for enforcing Section 504 against that recipient.[30] In reality, therefore, the administrative proceedings are ineffective as a remedy for an individual Section 504 complainant.

Of course, when a Section 504 claim is brought by a disabled individual in conjunction with a claim under another federal law that *does* require exhaustion of administrative remedies prior to filing suit, exhaustion of the administrative steps prescribed by the second law is required. Thus, for example, if a disabled individual wishes to file an action claiming educational discrimination under both

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"recipients of federal financial assistance." Nevertheless, the court held that "[Section] 504 and the accompanying regulations can be read as requiring a showing that the discrimination took place under a federally funded program, but as permitting a suit against individuals responsible for discriminatory policies as well as against the entity receiving federal funds." 587 F. Supp. at 521.

[28] *See, e.g., Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372 (10th Cir. 1981); *Miener v. Missouri*, 673 F.2d 969, 978-79 (8th Cir.), *cert. denied*, 459 U.S. 909 (1982); *Kling v. County of Los Angeles*, 633 F.2d 876 (9th Cir. 1980); *Greater Los Angeles Council on Deafness, Inc. v. Community Television of Southern California*, 719 F.2d 1017 (9th Cir.), *cert. denied*, 104 S. Ct. 3535, *reh'g denied*, 468 U.S. 1224 (1984). One court has held to the contrary. *See Smith v. U.S. Postal Service*, 742 F.2d 257 (6th Cir. 1984).

[29] It should be noted that one court has held that prior to terminating or suspending federal funding (or denying future funding) to a recipient a formal hearing must be conducted to determine whether the recipient is in violation of Section 504. *See New York City Housing Authority v. Kemp*, 52 Empl. Prac. Dec. (CCH) ¶ 39,569 (S.D.N.Y. 1989) (citing the Section 504 regulation promulgated by the Department of Housing and Urban Development, 24 C.F.R. §8.57(c), which provides that "[n]o order suspending, terminating, or refusing to grant or continue Federal financial assistance shall become effective until: (2) [t]here has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed under [Section 504]").

[30] *See, e.g.*, 45 C.F.R. §§80.8-.9 and 81.21-.23 (1989).

Section 504 and the Education for All Handicapped Children's Act (EAHCA),[31] the administrative procedures prescribed under the EAHCA must be followed prior to filing such a private action.[32] Similarly, if a disabled individual files an action claiming employment discrimination under both Sections 504 and 501[33] of the Rehabilitation Act, the administrative procedures prescribed under Section 501 must be pursued prior to filing such suit.[34]

C. Eleventh Amendment Immunity

The Eleventh Amendment to the United States Constitution protects states (and thus state agencies) from being sued by private citizens, unless Congress, when passing a particular law under the Fourteenth Amendment, abrogates state immunity under that law, or unless a particular state consents to suit or waives its right to claim immunity to suit under a particular law.[35] In the 1985 case of *Atascadero State Hospital v. Scanlon*[36] the Supreme Court held that, pursuant to the Eleventh Amendment, a disabled individual could not sue a state (or state agency) in federal court under Section 504.

In *Atascadero* the Court held that, in enacting Section 504, Congress did not intend to overturn the states' Eleventh Amendment immunity to suit, despite the fact that Section 504 was enacted for the purpose of prohibiting state agencies from discriminating against disabled people. The Court held that Congress's general authorization in Section 504 permitting suits in federal court is not the kind of unequivocal statutory language necessary to abrogate the Eleventh Amendment. Further, the Court held that by accepting funds under the Rehabilitation Act a state did not thereby consent to being sued under Section 504 of that Act. In sum, the Court concluded in *Atascadero* that states (and state agencies) are not subject to suit in federal court by litigants seeking retroactive monetary relief under Section 504.

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[31] *See* chapters 13-18 of this text, *infra*.

[32] *See* 20 U.S.C.A. §1415(b) (1990). *See also, G.C. v. Coler*, 673 F. Supp. 1093 (S.D. Fla. 1987); *Phipps v. New Hanover County Board of Education*, 551 F. Supp. 732 (E.D.N.C. 1982); *Calhoun v. Illinois State Board of Education*, 550 F. Supp. 796 (N.D. Ill. 1982); *M.R. v. Milwaukee Public Schools*, 584 F. Supp. 767 (E.D. Wisc. 1984). *School Committee of the Town of Acton v. Bennett*, No. 3638-MA, slip op. (D. Mass. June 23, 1987). This rule is excused, however, and exhaustion of remedies under the EAHCA is not required, when such exhaustion would be futile or if the only available administrative remedy is plainly inadequate. *See*, e.g., *Riley v. Ambach*, 668 F.2d 635, 641 (2d Cir. 1981); *Doe v. Belleville Public School District No. 118*, 672 F. Supp. 342, 345 (S.D. Ill. 1987). For a discussion of this issue *see* chapter 13 of this text, *infra*.

[33] *See* chapter 9 of this text, *infra*.

[34] *See, e.g., McGuinness v. U.S. Postal Service*, 744 F.2d 1318 (7th Cir. 1984); *Boyd v. U.S. Postal Service*, 752 F.2d 410 (9th Cir. 1985).

[35] The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any Foreign State.

This Amendment has been interpreted as prohibiting suits against a state by citizens of that state. *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504 (1890).

[36] 473 U.S. 234, 105 S. Ct. 3142 (1985).

The Court's ruling in *Atascadero* effectively emasculated Section 504's ability to address discrimination by states, because it left states virtually immune from private sanctions for their discriminatory conduct against disabled persons. In response to the resulting public outcry to remedy that situation, Congress passed the Rehabilitation Act Amendments of 1986.[37] Section 1003 of those Amendments, entitled "Civil Rights Remedies Equalization,"[38] provides that a state shall not be immune under the Eleventh Amendment from suit in federal court for a violation of Section 504 of the Rehabilitation Act, Title IX of the Education Amendments of 1972,[39] the Age Discrimination Act of 1975,[40] Title VI of the Civil Rights Act,[41] or the provisions of any other federal law prohibiting discrimination by recipients of federal financial assistance. That section further provides that in a suit against a state for a violation of any such federal statute, remedies at law and in equity are available to the same extent that such remedies are available against private parties or entities.

Pursuant to the Civil Rights Remedies Equalization amendment, therefore, states and state agencies are subject to suit by disabled persons under Section 504 to the same extent that private individuals and entities are subject to such suit.[42] It is interesting to note that this amendment, passed in response to the lobbying efforts of disabled people and their advocates, benefits many groups in addition to disabled people — women, racial minorities and the aged, for example — because the amendment applies to *all* federal laws in which any form of discrimination by recipients of federal financial assistance is prohibited.

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[37] Pub. L. No. 99-506, 100 Stat. 1807, 99th Cong., 2d Sess. (1986).

[38] *Id.*, Section 1003. *See* 42 U.S.C.A. §2000d-7 (West Supp. 1990).

[39] 20 U.S.C.A. §1681(a) (1990).

[40] Pub. L. No. 95-256, §1, 92 Stat. 189 (codified as amended in scattered sections of 29 U.S.C. and 5 U.S.C.).

[41] 42 U.S.C.A. §§2000d-2000d-5 (1981 and West Supp. 1990).

[42] It has been held, however, that the Rehabilitation Act Amendments of 1986 do not apply to Section 504 cases filed prior to October 1986. In *Jackson v. Maine*, 544 A.2d 291 (Me. 1988), *cert. denied*, 109 S. Ct. 3185 (1989), the court held, in accord with the Supreme Court's ruling in *Scanlon*, that a state was immune from suit on Section 504 claims filed prior to the effective date of the Rehabilitation Act Amendments. The court stated that the Rehabilitation Act "amendment applies only to . . .

D. Burdens of Proof

The courts have reached conflicting conclusions regarding the respective roles of the plaintiff and defendant in proving or disproving a violation of Section 504. First it must be shown that the plaintiff is handicapped within the meaning of the Act and that the defendant is a recipient of federal financial assistance. Then, in order to find that Section 504 has been violated, it must be shown that: (1) the plaintiff is "otherwise qualified" for the job or program at issue; and (2) the defendant discriminated against the plaintiff "solely on the basis of handicap." What is the plaintiff's burden of proof, and what is the defendant's burden of proof, with respect to the latter issues?

Section 504 was based upon, and modeled after, civil rights laws prohibiting discrimination on the basis of race and sex. The wording of Section 504 closely parallels the wording of Titles VI and VII of the Civil Rights Act, which prohibit discrimination on the basis of race or sex.[43] Thus, many courts have followed the burden-of-proof analysis applicable to Civil Rights Act cases when deciding cases under Section 504.

Under the Supreme Court's rulings in *McDonnell Douglas v. Green*[44] and *Texas Department of Community Affairs v. Burdine*,[45] a plaintiff who claims intentional discrimination under the Civil Rights Act on the basis of race or sex in an employment context must first establish a *prima facie* case by showing that the plaintiff applied for a position for which he or she was qualified and was rejected under circumstances indicating that he or she was discriminated against on the basis of race or sex. The defendant employer then has the burden of rebutting

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[Section 504] violations occurring after October 21, 1986. . . ." 544 A.2d at 299 n.10. The Supreme Court's refusal to hear the case (109 S. Ct. 3185 (1989)) effectively upheld pre-1986 state immunity under Section 504.

[43] Title VI of the Civil Rights Act, 42 U.S.C.A. §2000d (1981) provides:

> No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Title VII of the Civil Rights Act, 42 U.S.C.A. §2000e-2(a)(1)-(2) (1981) provides, in pertinent part:

> (a) It shall be an unlawful employment practice for an employer
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[44] 411 U.S. 792, 93 S. Ct. 1817 (1973).

[45] 450 U.S. 248, 101 S. Ct. 1089 (1981).

the resultant presumption of discrimination by presenting evidence sufficient to create a factual dispute as to whether the plaintiff was denied the position for legitimate reasons. The plaintiff then bears the ultimate burden of proving that the reasons given by the employer were merely a pretext for discrimination. Several courts have applied a similar analysis in Section 504 cases, in both employment and non-employment cases.[46]

A few courts have followed a somewhat different burden-of-proof analysis in Section 504 cases. Under the test enunciated in *Pushkin v. Regents of the University of Colorado*,[47] the plaintiff must establish a *prima facie* case by showing that he or she was otherwise qualified for the position or program sought and was rejected under circumstances indicating that the rejection was solely on the basis of handicap. The burden of proof then shifts to the defendant to show that the plaintiff is not otherwise qualified. If the defendant meets this burden, the plaintiff may then show that the reasons for denial were based on misconceptions or unfounded factual conclusions about the handicap, and that the defendant's assertions that the rejection was based on reasons other than the handicap encompass unjustified consideration of the handicap itself.[48]

The basic difference between the two tests is as follows: Under the first test the defendant's burden of proof is satisfied by merely presenting evidence sufficient to raise a factual question as to whether the plaintiff is otherwise qualified for the program or position. Under the *Pushkin* test, however, the defendant's burden of proof is only satisfied by presenting a preponderance of the evidence (rather than merely coming forward with *some* evidence) showing that the plaintiff is not otherwise qualified. To date the Supreme Court has not addressed this question, and the lower courts tend to be leaning toward following the "traditional" approach applied in Civil Rights Act cases.

In the opinion of the authors, requiring the defendant to present persuasive evidence that the plaintiff is not otherwise qualified more fairly comports with the purpose of Section 504. Section 504 was enacted for the primary purpose of eliminating discrimination based on stereotypical judgments concerning the capabilities of disabled people. Thus, a defendant who alleges that a Section 504 plaintiff is not otherwise qualified for the program or job at issue should be required to show that there are *real*, rather than imagined, reasons that prevent the plaintiff from performing as required. If a Section 504 defendant is required merely to present evidence indicating that an applicant's handicap is *relevant* to his or her ability to perform, the true objective of Section 504 will be impeded, as misconceptions about the capabilities of disabled people will likely remain uncorrected.

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[46] *See, e.g., Reynolds v. Brock*, 815 F.2d 571, 574 (9th Cir. 1987); *Johnson v. Legal Services of Arkansas*, 813 F.2d 893, 896 (8th Cir. 1987); *Norcross v. Sneed*, 755 F.2d 113, 117-18 (8th Cir. 1985); *Sisson v. Helms*, 751 F.2d 991, 993 (9th Cir.), *cert. denied*, 474 U.S. 846 (1985); *Prewitt v. U.S. Postal Service*, 662 F.2d 292, 307 (5th Cir. 1981); *Doe v. New York University*, 666 F.2d 761, 776-77 (2d Cir. 1981); *Johnson v. Smith*, 39 Fair Empl. Prac. Cas. (BNA) 1106 (D. Minn. 1985).

[47] 658 F.2d 1372, 1385 (10th Cir. 1981).

[48] The *Pushkin* test has been followed in other jurisdictions. *See, e.g., Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983); *Fynes v. Weinberger*, 677 F. Supp. 315, 320-21 (E.D. Pa. 1985); *Doherty v. Southern College of Optometry*, 659 F. Supp. 662, 670 (W.D. Tenn. 1987); *aff'd in part and rev'd in part*, 862 F.2d 570 (6th Cir. 1988), *cert. denied*, 110 S. Ct. 53 (1989); *Hurst v. U.S. Postal Service*, 653 F. Supp. 259, 261 (N.D. Ga. 1986); *Jasany v. U.S. Postal Service*, 755 F.2d 1244, 1249 n.5 (6th Cir. 1985); *Ross v. Beaumont Hospital*, 687 F. Supp. 1115, 1118 (E.D. Mich. 1988).

Because many courts have heretofore followed the burden-of-proof analysis applied in employment cases under Titles VI and VII of the Civil Rights Act, it is important to consider a recent Supreme Court decision. In *Wards Cove Packing Co., Inc. v. Atonio*[49] the Court held that in a Title VII employment discrimination action an employee bears the burden of proving that the employer has no legitimate business reasons for engaging in the action which the employee claims is discriminatory. If this rule is held to apply in Section 504 employment discrimination cases, a disabled plaintiff will bear the ultimate burden of proving a negative — the lack of business justification for a discriminatory practice — while the employer will not bear the burden of proving the positive — the legitimate business reasons for the discriminatory treatment, notwithstanding that the information relating to business justification is primarily in the hands of the employer.

Civil rights leaders have widely protested the *Wards Cove* ruling, as well as other 1989 civil rights rulings by the Supreme Court.[50] Congress is currently considering passage of the Civil Rights Act of 1990, which would provide that once an employee proves that the employer has engaged in a discriminatory practice the employer bears the burden of proving that the challenged practice is necessary for the operation of the business.[51]

E. Statutes of Limitations

Section 504 does not contain a specified statute of limitations that defines the time frame during which a plaintiff must file suit under the Act. Accordingly, numerous courts have held that the applicable statute of limitations is the state statute that most closely applies in similar types of actions. In *Andrews v. Consolidated Rail Corporation*, for example, the court held that the applicable statute of limitations with respect to the plaintiff's Section 504 employment discrimination claim was Indiana's two-year limitation period for actions "relating to the terms, conditions, and privileges of employment. . . ."[52] The court relied on the Supreme Court's decision in *O'Sullivan v. Felix*[53] when holding that where federal law does not provide its own statute of limitations the court should look to the most appropriate time limitation imposed under state law. Other courts have followed similar reasoning, albeit with differing results, when applying state statutes of limitations to Section 504 actions.[54]

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[49] 488 U.S. ______, 110 S. Ct. 38 (1989).

[50] Civil rights advocates have objected to *Patterson v. McLean Credit Union*, ______ U.S. ______, 109 S. Ct. 2363 (1989), and *Martin v. Wilks*, ______ U.S. ______, 110 S. Ct. 11 (1989). In *Patterson* the Court interpreted Section 1981, 42 U.S.C. §1981, which prohibits racial discrimination in contract agreements. The Court held that although under Section 1981 a plaintiff could sue for damages incurred as a result of discriminatory conduct arising out of a hiring agreement, an employee could not sue her former employer for discrimination in the workplace under that statute. In *Martin* the Court held that non-parties can challenge consent decrees entered into by parties to resolve affirmative action disputes, and that such challenges can be made years after such decrees are implemented. The *Martin* case may have particularly discouraging ramifications for disabled people.

[51] H.R. 4000, 101st Cong., 2d Sess., S. 2104, 101st Cong., 2d Sess. (1990). As this book went to press, versions of the Act had been passed by both the House and Senate and resolved by the Joint Conference Committee. The Senate had passed the resolution and House action was expected. President Bush, however, has repeatedly threatened to veto the Act. For other discussion of this Act, see note 64 of chapter 12, *infra*.

Because Section 504 complaints are grounded on federal statutes and regulations, however, federal law will determine when a claim under Section 504 accrues. It has been held that "under federal law [including Section 504], a cause of action accrues, and the statute of limitations begins to run, where a plaintiff knows or had reason to know of the injury which forms the basis of the complaint."[55] Thus, in *Eastern Paralyzed Veterans Association of Pennsylvania,*

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[52] 831 F.2d 678, 683 (7th Cir. 1987).

[53] 233 U.S. 318, 34 S. Ct. 596 (1914).

[54] See, e.g., *Doe v. Southeastern University*, 732 F. Supp. 7 (D.D.C. 1990) (applying the District of Columbia's three-year personal injury statute of limitations to plaintiff's Section 504 claim based on improper disclosure of medical records); *Eastman v. Virginia Polytechnic Institute and State University*, 732 F. Supp. 665 (W.D. Va 1990) (applying Virginia's one-year statute of limitations for actions under the Virginia Rights of Persons With Disabilities Act to plaintiff's Section 504 claim for employment discrimination); *Byrne v. Board of Education*, 51 Empl. Prac. Dec. ¶ 39,303 (E.D. Wis. 1989) (applying Wisconsin's six-year limitation period for "an action upon a liability created by statute when a different limitation is not prescribed by law" to plaintiff's Section 504 employment discrimination claim); *Fleming v. New York University*, 865 F.2d 478, 481 (2d Cir. 1989) (applying New York's three-year statute of limitations for actions "to recover upon a liability, penalty or forfeiture created or imposed by statute" in plaintiff's Section 504 claim against New York University premised on allegedly discriminatory treatment in the provision of housing); *Marin v. New York State Department of Labor*, 512 F. Supp. 353 (S.D.N.Y. 1981) (three-year state statute of limitations relating to actions created by statute applied to Section 504 employment discrimination claim); *Dyer-Neely v. City of Chicago*, No. 83 C 5376, slip op. (N.D. Ill. September 8, 1986) (five-year state statute of limitations applicable to oral contracts held to apply to Section 504 action); *Sullivan v. City of Pittsburgh*, 811 F.2d 171 (3d Cir. 1987) (two-year state statute of limitations applicable to personal injury claims held to apply to Section 504 action), *cert. denied*, 484 U.S. 849 (1987); *Alexopulos v. San Francisco Unified School District*, 817 F.2d 551 (9th Cir. 1987) (three-year state statute of limitations applicable in personal injury actions or one-year state statute of limitations applicable to actions "upon a liability created by statute" held to apply to Section 504 claim based on educational discrimination); *Di Medio v. Gerard Bank*, No. 86-3139, slip op. (E.D. Pa. April 15, 1987) (two-year state statute of limitations applicable to personal injury actions held to apply to Section 504 employment discrimination claim).

[55] *Eastern Paralyzed Veterans Association of Pennsylvania, Inc. v. Sykes*, 697 F. Supp. 854 (E.D. Pa. 1988) (footnote omitted).

Inc. v. Sykes[56] the court held that a cause of action under Section 504 against a transportation authority for failure to provide for wheelchair accessibility when renovating a subway station accrued after the renovation was complete, when wheelchair-bound persons were denied access to the station. The court held that the cause of action did not accrue when federal funds were approved for the renovation because "[i]t is the exclusion of an otherwise qualified handicapped individual, not the administrative decision to approve a funding request, which [S]ection 504 seeks to prevent."[57]

F. Abstention

Because Section 504 is a federal statute, Section 504 claims are usually raised and heard in federal court. In some situations, however, federal courts may abstain from hearing Section 504 actions until after analogous state proceedings are completed.

In *Wrzesinski v. Martwick*[58] the plaintiff filed an action in Illinois state court against the Illinois Department of Human Rights, alleging that he was improperly discriminated against when the Cook County School District Superintendent refused to issue him a school bus driver's permit because he had an artificial leg. Three years later, while the state action was still bogged down in procedural disputes, the plaintiff filed a Section 504 action in federal court against the

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[56] *id.*

[57] 697 F. Supp. at 858. In appropriate circumstances, the applicable statute of limitations may be held tolled, or the doctrine of equitable estoppel applied, to allow an action under Section 504 to proceed. In *Begay v. Hodel*, 730 F. Supp. 1001 (D. Ariz. 1990), the court explained the two doctrines as follows:

> Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. . . . Equitable estoppel, however, is a different matter. It is not concerned with the running and suspension of the limitations period, but rather comes into play only after the limitations period has run and addresses itself to the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forebearing suit within the applicable limitations period. Its application is wholly independent of the limitations period itself and takes its life, not from the language of the statute, but from the equitable principle that no man will be permitted to profit from his own wrongdoing in a court of justice.

730 F. Supp. at 1011 (citation omitted).

In *Begay*, the plaintiff claimed that she failed to file suit under Section 504 within the applicable statutory period because the defendant school district repeatedly assured the plaintiff that a school would be made accessible for the plaintiff in time for the "next school year." The district court held that a material fact existed as to whether the doctrine of equitable estoppel should be applied to prevent the school district from claiming that the plaintiff's suit was time-barred.

[58] No. 86 C 9377, slip op. (N.D. Ill. September 4, 1987) (available on Lexis genfed library).

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superintendent. The federal court, relying on two Supreme Court cases,[59] held that where parallel state and federal cases have been filed, in some situations it is appropriate for the federal court to abstain from hearing the case until the state action is resolved. The court opined that when determining whether abstention is appropriate courts should look to six factors: (1) the order in which jurisdiction is obtained; (2) the inconvenience of the federal forum; (3) whether abstention will prevent piecemeal litigation; (4) the absence of a federal question; (5) the absence of progress in the federal litigation; and (6) the willingness of the parties to litigate in state court. The court found that only one factor, the absence of a federal question, weighed *against* abstention. Since all other factors weighed *in favor of* abstention, particularly the fact that abstention would avoid piecemeal litigation, abstention was deemed appropriate. Thus the federal court declined to hear the Section 504 action until the analogous state action was resolved.

Refusal of the district court to abstain when state proceedings are pending is not necessarily improper, however, particularly where the plaintiffs in the state and federal actions are different parties. In *Sullivan v. City of Pittsburgh*[60] plaintiffs filed an action under Section 504 claiming that a city's closure of alcohol treatment centers violated Section 504. When plaintiffs filed the federal action, state administrative proceedings previously filed against the defendants by the nonprofit corporation that ran the treatment centers were still pending. The court of appeals held that the district court's failure to abstain pending resolution of the state proceeding did not constitute an abuse of discretion because the state and federal plaintiffs were distinct entities with separate economic interests and activities.

G. Right to Jury Trial

It has been held that a Section 504 plaintiff has no right to a jury trial, at least where an agency of the federal government is the defendant. In *George v. Brock*[61] the plaintiff sued his employer, the federal Labor Management Services Administration, claiming employment discrimination under both Sections 501[62] and 504 of the Rehabilitation Act. The plaintiff argued that since Section 505 of the Rehabilitation Act[63] provides that the remedies available under Title VI of the Civil Rights Act of 1964 apply with respect to actions under Section 504, and since courts have awarded damages in both Section 504 and Title VI cases, a Section 504 plaintiff has the right to a trial by jury. The plaintiff's allegation was that the

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[59] *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S. Ct. 1236 (1976); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S. Ct. 927 (1983).

[60] 811 F.2d 171 (3d Cir.), *cert. denied*, 484 U.S. 849 (1987).

[61] No. 86-6794, slip op. (E.D. Pa. August 21, 1987) (available on Lexis genfed library).

[62] *See* chapter 9 of this text, *infra*.

[63] 29 U.S.C.A. §794a (West Supp. 1990).

"availability of compensatory damages under Section 504 is the key to the jury trial right."[64] The court disagreed. The court stated that the "Seventh Amendment right to trial by jury does not apply in actions against the federal government," unless the right to a jury trial is "one of the terms of the Government's consent to be sued."[65] The court noted that it had "not found any section of the Rehabilitation Act in which Congress affirmatively and unambiguously granted the right to trial by jury."[66] Since the *George* case was decided in August 1987, after passage of the Rehabilitation Act Amendments of 1986, the court presumably did not feel that those amendments speak to this issue.

Although a jury trial may not be a matter of right, at least when the federal government is the defendant, jury trials may nevertheless be available in Section 504 cases if the parties agree. In *Doe v. Region 13 Mental Health-Mental Retardation Commission*[67] the court considered an appeal from the trial court's grant of judgment notwithstanding the (jury's) verdict. The plaintiff in *Doe* had requested a jury trial under Federal Rule of Civil Procedure 39(a),[68] and neither the defendant nor the trial court objected. On appeal the Fifth Circuit expressed doubt that jury trials are a matter of right under Section 504.[69] The court noted that although Section 504 makes available all the remedies available under Title VI,[70] those remedies are equitable rather than legal. The court opined that the fact that Section 504 plaintiffs could not recover legal damages "underscored" the "inappropriateness" of a jury trial under Section 504.[71] As the trend in Section 504 law grows toward permitting plaintiffs to recover damages, however,[72] this rationale for denying jury trials becomes less compelling.

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[64] No. 86-6794, slip op. (E.D. Pa. August 21, 1987).

[65] *Id.*

[66] *Id. See also, Giles v. Equal Employment Opportunity Commission*, 520 F. Supp. 1198, 1200 n.1 (E.D. Mo. 1981) ("[s]ince there is no right to a jury trial under Title VII [of the Civil Rights Act of 1964, 42 U.S.C. §2000e-16] there is no such right in an action brought under the Rehabilitation Act").

[67] 704 F.2d 1402 (5th Cir. 1983).

[68] Federal Rule of Civil Procedure 39(a) provides as follows:

> When trial by jury has been demanded as provided in Rule 38, the action shall be denigrated upon the docket as a jury action. The trial of all issues so demanded shall be by jury unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or of all of these issues does not exist under the Constitution or statutes of the United States.

[69] 704 F.2d at 1407 n.3.

[70] 42 U.S.C.A. §2000d-5 (1981).

[71] 704 F.2d at 1407 n.3.

[72] *See* chapter 8 of this text, *infra*.

The most obvious way of obtaining a jury trial under Section 504 is to append the Section 504 claim to other claims that may be tried to a jury. In *Hart v. Mayor and City Council of Baltimore*,[73] for example, a jury heard the plaintiff's claims under Sections 504, 1981[74] and 1983.[75] And, in *Ross v. Beaumont Hospital*[76] a jury heard the plaintiff's employment discrimination claim premised on Section 504 and a Michigan state statute prohibiting employment discrimination on the basis of handicap. In the opinion of the authors, such a practice is based on sound application of the jury's fact finding function. Requiring severance of a plaintiff's Section 504 claim could fundamentally alter the plaintiff's right to a jury trial on the remaining claims. For example, if a plaintiff's Section 504 claim were first tried before the court, the resolution of that claim might raise problems of issue preclusion and might thus prejudice the plaintiff's remaining claims in a subsequent jury trial.[77] The preclusive effect of facts found in the Section 504 case would erode the plaintiff's right to try the remaining claims in front of a jury.[78] Denying a jury trial when a Section 504 claim is appended to other claims could force an unnecessary choice of remedies.

H. Standing To Sue

Generally, only those persons who are handicapped within the meaning of Section 504 are intended to be within the zone of interest protected by the Act. Thus, as a general rule only such handicapped persons have standing to sue under Section 504.

Accordingly, several courts have held that non-handicapped plaintiffs lacked standing to sue under Section 504. In *Nodleman v. Aero Mexico*,[79] for example, a non-disabled plaintiff sued an airline under Section 504, claiming that she had been prevented from taking a scheduled flight because the airline refused to board her wheelchair-bound husband and traveling companion. The court held that the non-disabled plaintiff was not within the class of people intended to benefit under Section 504 and thus lacked standing to sue. Similarly, in *Hoyt v. St. Mary's Rehabilitation Center*[80] the court held that a nursing home patient's "next friend and daily visitor," who was neither related to the patient nor the patient's guardian, lacked standing to sue the nursing home under Section 504 on behalf of her disabled friend.[81]

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[73] 625 F.2d 13 (4th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

[74] 42 U.S.C.A. §1981 (1981).

[75] 42 U.S.C.A. §1983 (1981).

[76] 687 F. Supp. 1115 (E.D. Mich. 1988).

[77] *See, e.g., Allen v. McCurry*, 449 U.S. 90 (1980) (full and fair opportunity to litigate issue gives rise to issue preclusion even if the first litigation takes place without a jury).

[78] *See, e.g., Beacon Theatres v. Westover*, 359 U.S. 500, 79 S. Ct. 948 (1959) (issue tried before a court may bar relitigation of the same issue before a jury).

[79] 528 F. Supp. 475 (C.D. Cal. 1981).

[80] 711 F.2d 864 (8th Cir. 1983).

Persons who are not actually handicapped but who are incorrectly classified as being handicapped and are excluded from a federally funded program on that ground have, however, been held to have standing to sue under Section 504.[82] Other persons intended to be protected by the Act have also been held to have standing. A school psychologist, for example, who was fired for complaining to an outside agency about the suspension of a handicapped student was held, in *Ross v. Allen*,[83] to have standing to sue under Section 504. The court held that the psychologist was within the zone of interest protected by the Act and was in fact injured within the meaning of the Act.

Organizations made up of handicapped persons, of course, generally have standing to sue under Section 504.[84] But if there is an insufficient nexus between the organization and the injury claimed, standing will be denied. Thus, in *Andrew H. by Irene H. v. Ambach*[85] the court held that nonprofit organizations lacked standing to file suit under Section 504 protesting the New York Commissioner of Education's method of determining tuition-reimbursement for the cost of educating handicapped children. According to the court, the only organization-related injury was that members of the organizations were detrimentally affected by arbitrary rate-making procedures; no allegation was made that the organizations suffered pecuniary losses, and no private schools were being injured by application of the new tuition reimbursement methodologies. The court noted that while an organization may have standing based on injury to itself, or in its representational capacity on behalf of its members who would otherwise have standing to sue, neither of those tests had been satisfied in *Andrew*.

Further, an association will probably not be held to have standing to maintain a suit on behalf of its members when the suit requires participation of individual members. In *Lutter v. Fowler*[86] the American Council for the Blind attempted to sue the Federal Communications Commission for the latter's alleged discrimination against a blind employee, Mr. Lutter. The court noted that an association has standing to maintain a suit on behalf of its members when " '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.' "[87] In denying standing to the Council, the court stated that the Council's "members would not otherwise have standing, the interest sought to be protected is germane to the Council's purposes in a very general and incidental sense only, and the presentation of the case required individualized proof by Mr. Lutter."[88]

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[81] *See also, Nelson v. Tuscarora Intermediate Unit No. 11*, 426 A.2d 1234 (Commw. Ct. Pa. 1981), *aff'd*, 457 A.2d 1260 (Pa.), *cert. denied*, 464 U.S. 866 (1983) (institution for mentally retarded children lacked standing to assert rights under Section 504 for payment of the child's public education; only the child or his parents could assert a cause of action under Section 504).

[82] *See, e.g., Carter v. Orleans Parish Public Schools*, 725 F.2d 261 (5th Cir. 1984).

[83] 515 F. Supp. 972 (S.D.N.Y. 1981).

[84] *See, e.g., Williams v. United States*, 704 F.2d 1162 (9th Cir. 1983); *Greater Los Angeles Council on Deafness v. Community Television of Southern California*, 719 F.2d 1017 (9th Cir.), *cert. denied*, 467 U.S. 1252 (1983); *NAACP v. Medical Center, Inc.*, 599 F.2d 1247 (3d Cir. 1979); *Leary v. Crapsey*, 566 F.2d 863 (2d Cir. 1977); *United Handicapped Federation v. Andre*, 558 F.2d 413 (8th Cir. 1977).

[85] 600 F. Supp. 1271 (N.D.N.Y. 1984).

[86] 41 Fair Empl. Prac. Cas. (BNA) 1227 (D.D.C. 1986).

III. Recipients of Federal Financial Assistance

Section 504 prohibits discrimination against disabled people only in those "programs or activities" that receive "federal financial assistance." The Department of Justice regulations define the term "federal financial assistance" as follows:

> any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the [agency] provides or otherwise makes available assistance in the form of:
> (1) Funds
> (2) Services of federal personnel; or
> (3) Real and personal property or any interest in or use of such property, including:
> (i) Transfers or leases of such property for less than fair market value or for reduced consideration; and
> (ii) Proceeds from a subsequent transfer or lease of such property if the federal share of its fair market value is not returned to the Federal Government.[89]

Notwithstanding this attempt to define those "programs or activities" that are "recipients" of "federal financial assistance," the precise meaning or scope of these terms has been the subject of much dispute.

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[87] 41 Fair Empl. Prac. Cas. (BNA) at 1229 (citing *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441 (1977)).

[88] *Id.*

[89] 28 C.F.R. §41.3(e) (1989). *See also*, 28 C.F.R. §84.3(h) (1989) (DHHS regulations). For a discussion of the issue relating to procurement, insurance or guaranty contracts, *see* section III D of this chapter, *infra*.

A. Program Specificity

The most highly publicized (and controversial) case addressing this issue is *Grove City College v. Bell.*[90] *Grove City* involved Title IX of the Education Amendments, which prohibits sex discrimination in any education program or activity receiving federal financial assistance.[91] Although Grove City College did not receive direct federal aid to its programs, the College had a large number of students who received federal Basic Educational Opportunity Grants. The Supreme Court held that Grove City College was a recipient of federal financial assistance because its students financed their education with the federal grants that were enacted in express recognition of discrimination in the administration of student financial aid programs. The Court held that the term "recipients of federal financial assistance" includes recipients who receive both direct and indirect aid from the federal government.

Unfortunately, the Supreme Court negated the effect of this broad ruling by also holding that *only* the specific program within an entity or institution that receives direct or indirect federal financial assistance must comply with the applicable antidiscrimination mandate. The Court held that since it was only the student financial aid office at Grove City College that received the indirect federal financial assistance, only the financial aid program — but not the entire college — was required to comply with Title IX's antidiscrimination provision. The fact that the college had the discretion to disburse the funds received from student grants throughout the whole institution was apparently considered immaterial.

The *Grove City* "program specificity" ruling (that only the specific program within an entity receiving federal financial assistance must comply with Title IX) was held to apply in similar fashion under Section 504.[92] Accordingly, under *Grove City* only the particular portion of an entity or program that initially received direct or indirect federal financial assistance was prohibited from discriminating against disabled people under Section 504; the remaining sections of the entity or program were free to discriminate at will.[93]

The *Grove City* case virtually eviscerated Section 504. Very few cases were able to pass the jurisdictional "program or activity" test, and thus very few administrative or private cases were filed under the Act. The case created an absolute furor in numerous quarters, particularly among disabled rights advocates. Legislation was almost immediately proposed in Congress to alleviate the impediments of *Grove City*. In April 1984 Senators Kennedy and Packwood introduced the Civil Rights Act of 1984. That act sought to change the wording of Title IX, Title VI of the Civil Rights Act, Section 504 and the Age Discrimination Act, each of which provided that various classes of people should not be subject to discrimination "under any program or activity receiving federal financial assistance," to provide instead that such people should not be subject to discrimination "by any recipient of federal financial assistance." The Senate bill had 63 cosponsors. In June 1984 an identical bill passed the House by a vote of 375 to 32. Nevertheless, the bill was tabled after a Senate filibuster. A similar bill was introduced in the Senate in 1985 with 47 cosponsors but, like its predecessor, was never enacted.

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[90] 465 U.S. 555, 104 S. Ct. 1211 (1984).

[91] Title IX, 20 U.S.C.A. §1681(a) (1990), provides, in pertinent part, as follows:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

[92] *See, e.g., Consolidated Rail Corporation v. Darrone*, 465 U.S. 624, 104 S. Ct. 1248 (1984).

[93] *See, e.g., Doyle v. University of Alabama*, 680 F.2d 1323 (11th Cir. 1982) (a disabled university employee could not sue the university for employment discrimination because, although the university at large received federal financial assistance, the particular program that hired the disabled employee did not directly benefit from such funds; that program, therefore, was not subject to the non-discrimination mandate of Section 504).

In February 1987 the Civil Rights Restoration Act of 1987 was introduced by 58 cosponsors; it was ultimately passed in March 1988.[94] This Act added a section to each of the four statutes — Title IX, Title VI, Section 504 and the Age Discrimination Act — defining the phrase "program or activity" in each statute to make it clear that discrimination is prohibited throughout entire agencies or institutions if any part of an agency or institution receives federal financial assistance. With respect to educational institutions, the Civil Rights Restoration Act provides that where federal aid is extended anywhere within a college, university or public system of education, the entire university or system is covered under the applicable federal statute. With respect to state and local governments, the entire department or agency receiving the aid is covered. Where an entity of state or local government receives federal aid and distributes it to another department or agency, both entities are covered.[95] With respect to private corporations, if the federal aid is extended to the corporation as a whole, or if the corporation provides a public service (such as social services, education or housing), the entire corporation is covered. If the federal aid is extended to only one plant or geographically separate facility, however, only that plant is covered. With respect to all other entities, the entire entity is covered if it receives any federal aid.

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[94] Pub. L. No. 100-259 §1, 102 Stat. 28 (1988) (codified in 20 U.S.C. §§1687, 1688, 42 U.S.C. §2000d-4a, 42 U.S.C. §6107 and 29 U.S.C. §§706, 794).

[95] It has been held, however, that an entire city is not a "program or activity" under the Civil Rights Restoration Act. In *Schroeder v. City of Chicago*, 715 F. Supp. 222 (N.D. Ill. 1989), a Chicago firefighter who was discharged from his job filed a Section 504 action against the Chicago Fire Department. Schroeder claimed that, because the City of Chicago received federal financial assistance, all of the City's programs must comply with Section 504. The court disagreed, on the ground that the Chicago Fire Department did not receive federal financial assistance, either directly from the federal government or indirectly via the City of Chicago. The court held that "nothing in the amendment's legislative history suggests that Congress contemplated classifying an entire municipality like the City of Chicago as a 'program or activity' subject to Section 504 . . . ." 715 F. Supp. at 225-26.

Under this ruling, compliance with Section 504 is held to be program-specific with respect to state and local governments. Only those specific programs and activities within the state or local government that receive federal financial assistance must comply with Section 504; the state or city as a whole need not abide by Section 504's antidiscrimination mandate.

The "program specificity" requirement of *Grove City*, therefore, has been essentially eliminated by the Civil Rights Restoration Act, which makes it clear that whenever any part of an entity or agency receives federal financial assistance (direct or indirect) the entire entity or agency must comply with Section 504.[96] (Presumably, the remainder of the *Grove City* decision, which holds that indirect federal aid is indistinguishable from direct aid, remains intact.) Other questions about the scope of the terms "program or activity," "recipient" and "federal financial assistance," however, are not as easy to answer.

B. Scope of the Term "Program or Activity"

An initial question to be resolved is the breadth of the term "program or activity." Should that term be held, for example, to include involuntary incarceration in prison? In *Brauner v. McConnell*[97] the court held that it would violate the legislative intent of Section 504 "to expand it to include involuntary incarceration within the definition of 'program or activity.' "[98] Thus, the *Brauner* court held that a disabled prisoner could not sue under Section 504 to protest alleged discrimination in prison on the basis of his disability. At least one federal circuit court, however, has expressly ruled to the contrary. In *Bonner v. Lewis* the Ninth Circuit explicitly recognized that a prison "program" constitutes a "program or activity" within the meaning of Section 504.[99] The scope of the term "program or activity" may raise controversy in other areas as well.

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[96] Two courts have held that the Civil Rights Restoration Act applies retroactively to cases pending before the effective date of that Act in 1988. In *Leake v. Long Island Jewish Medical Center*, 869 F.2d 130 (2d Cir. 1989), the Second Circuit held that when enacting the Civil Rights Restoration Act Congress intended the Act to cover suits pending when that Act was passed. Thus the court refused to apply the *Grove City* "program specificity" holding to an action pending, but not completed, before the passage of the Civil Rights Restoration Act. And, in *Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988), the Ninth Circuit also held that the Civil Rights Restoration Act applies retroactively.

[97] No. C-84-0652-L(B) (W.D. Ky. March 25, 1986), *aff'd without opinion*, 815 F.2d 701 (6th Cir.), *cert. denied*, 484 U.S. 952 (1987).

[98] *Id.*, District Court's Order of March 25, 1986.

[99] 857 F.2d 559 (9th Cir. 1988). The court rejected the contention of prison officials that Congress never intended Section 504 to cover prisoners. The court noted that the "plain language of the Justice Department's implementing regulations (28 C.F.R. Part 42.503) and the Act itself, which states that it applies to 'any program or actively receiving federal financial assistance' (29 U.S.C. Part 794) belies their argument." 857 F.2d at 562. The court also recognized that Section 504's goal of independent living and vocational rehabilitation "should in fact mirror the goals of prison officials as they attempt to rehabilitate prisoners and prepare them to lead productive lives once their sentences are complete." *Id.*

C. "Recipients" Versus "Beneficiaries"

A second question to be resolved is the scope of the term "recipient." In a leading case on this issue, *United States Department of Transportation v. Paralyzed Veterans of America*,[100] the Supreme Court held that commercial airlines are not recipients of federal financial assistance. Plaintiffs in *Paralyzed Veterans* argued that commercial airlines are subject to Section 504 since they receive federal financial assistance in several forms, including: (1) the grant of an operating certificate or license; (2) the receipt of federal tax subsidies in the form of investment tax credits; and (3) the use of the air traffic control system furnished by the government. The Supreme Court disagreed with all of those contentions. The Court held that an operating certificate is not "financial" assistance, and that favorable tax treatment does not fall within the meaning of the term "federal financial assistance" because Congress did not intend that every entity or organization to whom it provided tax incentives should be bound by the provisions of Section 504. More importantly, the Court held that the federal government's direct financing of an extensive air traffic control system, which the Court acknowledged is indispensable to the existence of commercial airline companies, does not constitute federal financial assistance *to the airlines*. The Court held that the scope of Section 504 is limited to those who actually *choose to receive* federal financial assistance, as opposed to those who merely *benefit* from such assistance. According to the Court, only airports or airport operators choose whether to receive, and do receive, the federal financial assistance provided in the form of an air traffic control system. The airlines merely benefit from that assistance. The Court ruled, therefore, that airports, but not airlines, are the recipients of federal financial assistance that must comply with the non-discrimination mandate of Section 504.[101]

A point of possible confusion between the Supreme Court's rulings in *Grove City* and *Paralyzed Veterans* should be noted. In *Grove City* the Court held that recipients of federal financial assistance within the meaning of Section 504 are not limited to institutions that themselves apply for federal aid or receive checks directly from the federal government. Rather, *indirect* recipients of federal financial assistance are bound by the act. In *Paralyzed Veterans* the Court explained its statement in *Grove City* by noting that "we made [that] statement[ ] in the context of determining whom Congress intended to receive the federal money."[102] The Court explained that in *Grove City* Congress intended the college to receive the money from the student grants rather than the individual students to whom the checks were sent. According to the Court, *Grove City* holds that recipients of federal financial assistance are the *intended*, even if indirect, recipients of the assistance. Airlines are not the intended recipients of the federal financial assistance (the air traffic control system), however, but are merely the beneficiaries of assistance that is intended to be given to airports.

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[100] 477 U.S. 597, 106 S. Ct. 2705 (1986).

[101] Note, however, that airlines are now subject to an antidiscrimination mandate set forth in Section 404 of the Federal Aviation Act. *See* chapter 10 of this text, *infra*.

[102] 477 U.S. at 606, 106 S. Ct. at 2711.

The DHHS regulations are in accord with the Supreme Court's ruling that ultimate beneficiaries, rather than intended beneficiaries, do not fall within the coverage of Section 504. The DHHS regulations define the term "recipient" (of federal financial assistance) as meaning:

> [A]ny state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but *excluding the ultimate beneficiary of the assistance*.[103]

Similarly, the Civil Rights Restoration Act contains a rule of construction that leaves intact the then existing exemption from coverage of the civil rights laws for ultimate beneficiaries of federal financial assistance. Such ultimate beneficiaries as farmers who are the ultimate beneficiaries of federal loans, for example, and food stamp and welfare recipients, who are the ultimate beneficiaries of food stamps and welfare payments, are not "recipients of federal financial assistance."

The distinction between indirect beneficiaries and ultimate beneficiaries is not always crystal clear. Hospitals, physicians or other health care providers who receive Medicare or Medicaid funds from the federal government, for example, have been held by several courts to be recipients of federal financial assistance, thereby requiring that they comply with Section 504.[104] The DHHS regulations, however, take the position that Medicaid providers are recipients of federal financial assistance under the Act, but that Medicare providers are not, because "no federal financial assistance flows from the Department [of HHS] . . . under the program, since Medicare Part B — like other social security programs — is basically a program of payments to direct beneficiaries."[105] And, at least one court has stated that where a Section 504 defendant is not the health care provider per se but is instead the holding company or affiliate of the health care provider, the defendant, who benefits from Medicaid and Medicare funds received by its affiliated health care provider, is an "ultimate beneficiary" of such funds rather than a "recipient" under Section 504. In *Eivens v. Adventist Health System/ Eastern & Middle America*[106] the court held that a hospital holding company was not a recipient of federal financial assistance by virtue of the fact that the hospitals the company owned, leased and managed receive Medicaid and Medicare payments. The court relied on the Supreme Court's distinction between beneficiaries and recipients of federal funds in *Paralyzed Veterans* in holding that, while the hospitals themselves were recipients of Medicaid/Medicare funds, the holding company was simply a beneficiary of such funds.

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[103] 45 C.F.R. §84.3(f) (1980) (emphasis added).

[104] *See, e.g., Frazier v. Board of Trustees*, 765 F.2d 1278, 1288-91 (5th Cir. 1985), *cert. denied*, 476 U.S. 1142 (1986); *Tonnessen v. Youville Hospital*, No. 84-315-MA, slip op. (D. Mass. July 5, 1984) (available on Lexis genfed library); *United States v. University Hospital*, 575 F. Supp. 607, (E.D.N.Y. 1983), *aff'd*, 729 F.2d 144, *reh'g denied*, 729 F.2d 144 (2d Cir. 1984); *United States v. Baylor University Medical Center*, 564 F. Supp. 1495 (N.D. Tex. 1983), *aff'd in part*, 736 F.2d 1039 (5th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); *Peterson v. Holy Cross Hospital*, No. 86 C 9000, slip op. (N.D. Ill. April 13, 1987) (available on Lexis genfed library).

Another example of the complexity of this issue is found in *Moore v. Sun Bank of North Florida*.[107] The defendant in that case was a bank that participated in the Small Business Administration's Guaranteed Loan Program, wherein the SBA guarantees up to 90 percent of the value of a loan made by private lenders to small businesses. Sun Bank argued that under *Paralyzed Veterans* it was merely a beneficiary of SBA's program, rather than a recipient of federal financial assistance. The court held, however, that Sun Bank was a recipient rather than a beneficiary of the assistance because the bank was "able to make more attractive loans on which it earns interest and profits" as a result of its participation in the program.[108]

In sum, intended recipients of federal financial assistance, whether they receive such assistance directly or indirectly, fall within the scope of Section 504. Ultimate beneficiaries of federal financial assistance, however, who are not the intended recipients of such assistance do not fall within the scope of that Act. In many cases the lines that distinguish between the two categories may be somewhat fuzzy.

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[105] 45 C.F.R. §84'Appendix A, definitions (1989).

[106] 651 F. Supp. 340 (D. Kan. 1987).

[107] No. 87-617-Civ-J-16, slip op. (M.D. Fla., November 16, 1988). That case is presently on appeal to the Eleventh Circuit: No. 884018 (11th Cir., argued August 28, 1989).

[108] *Id.* at 8. *See also, O'Keefe v. Niagara Mohawk Power Corp.*, 714 F. Supp. 622, 631 (N.D.N.Y. 1989), where the court followed *U.S. Department of Transportation v. Paralyzed Veterans* in holding that a teacher for the New York Power Pool ("Power Pool") who taught courses at Oak Ridge University ("Oak Ridge") could not assert a cause of action under Section 504. Although Oak Ridge received federal assistance, the mere fact that the plaintiff's employer, Power Pool, had a contract with Oak Ridge did not render Power Pool a recipient of federal financial assistance. Rather, Power Pool was a mere beneficiary of such assistance.

D. Procurement, Insurance or Guaranty Contracts

While Section 504 itself does not define the term "federal financial assistance," the regulations promulgated pursuant to Section 504 provide that "procurement contracts" and "contracts of insurance or guaranty" do not fall within the definition of that term.[109] In *Moore v. Sun Bank of North Florida*[110] the plaintiff argued that because Section 504 itself does not contain any exclusionary language with respect to particular types of contracts, contracts of guaranty entered into by the government and private entities *do* constitute federal financial assistance, notwithstanding the regulations. The defendant bank in *Moore*, which participated in the Small Business Association's Guaranteed Loan Program (a guaranty contract), argued that the regulatory definition should prevail. The court disagreed, and held that "the absence of a textually demonstrable exclusion of contracts of insurance or guaranty from Section 504 is evidence of congressional intent not to exclude such contracts."[111]

Other courts have followed the regulatory definitions and held that procurement contracts do not constitute federal financial assistance. In *Cook v. Budget Rent-a-Car Corporation*[112] Budget argued that although it received funds from several government agencies in accord with the terms of numerous automobile rental contracts, the rental contracts constituted procurement contracts that fell outside the scope of Section 504 federal financial assistance. The court agreed, and held that the regulatory exemption of procurement contracts did not conflict with the statute. The court relied in part upon the legislative history of Section 504 in stating that the term "federal financial assistance" as used in Section 504 connotes such transactions as a transfer of government assets for reduced consideration, but does not include procurement contracts in which goods or services are sold or purchased by the government for its own account at fair market value.[113]

In the authors' opinion, it is difficult to reconcile the legislative intent of Section 504 to address discrimination with an analysis that limits the scope of Section 504's impact in those situations where the recipient receives fair consideration from the government for services rendered (rather than receiving more than fair consideration). Presumably, any recipient, even one receiving only fair value, has the choice whether to accept federal funds. Further, if Section 504 was enacted pursuant to the spending clause of the U.S. Constitution,[114] it would seem logical that Congress intended to make full use of its spending powers to prevent discrimination on the basis of handicap.

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[109] *See* text at note 89 of this chapter, *supra*.

[110] No. 87-617-CIV-J-16, slip op. (M.D. Fla., November 16, 1988).

[111] Slip op. at 4.

[112] 502 F. Supp. 494 (S.D.N.Y. 1980).

[113] *See also*, *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408 (9th Cir. 1984) (government mail contracts with airline did not constitute federal financial assistance); *De Vargas v. Mason & Hangar*, 40 Fair Empl. Prac. Cas. (BNA) 1803 (D.N.M. 1986) (procurement contract whereby government hired security personnel from a private company to guard a federal laboratory held not federal financial assistance because the purpose of hiring private guards was to realize a cost savings rather than to assist the private company).

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[114] U.S. Constitution, Art. I, §8. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 246, 105 S. Ct. 3142, 3149-50 and n.5 (1985). While not deciding whether Section 504 was enacted pursuant to the Spending Clause or the Fourteenth Amendment to the U.S. Constitution; the Court noted in *Atascadero* that "were we to view this statute as an enactment pursuant to the Spending Clause . . . we would hold that there was no indication that the State of California consented to federal jurisdiction." 473 U.S. at 247, 105 S. Ct. at 3150.

4

Section 504: Who Is a "Handicapped" Individual?

I. Introduction

Section 505 of the Rehabilitation Act[1] defines the term "handicapped" individual as follows:

> Except as otherwise provided in subparagraph (B), the term "individual with handicaps" means . . . any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of Sections [503 and 504 of the Rehabilitation Act] as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

Of primary concern, therefore, are the following questions:

1. What constitutes a "physical or mental impairment"?
2. Does the individual in question have the requisite impairment or a record of such impairment? If not, is the individual perceived as ("regarded as") having such an impairment?
3. What constitutes a "substantial limitation" of a "major life activity"?
4. Under what circumstances are alcoholics and drug abusers entitled to protection under Section 504?

This chapter will address each of these questions.

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[1] 29 U.S.C.A. §706(8)(A) (West Supp. 1990).

II. Physical or Mental Impairments

The Department of Health and Human Services regulations promulgated pursuant to Section 504 define the term "physical or mental impairment" as including:

> (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[2]

The analysis accompanying the regulations notes that this list is *not* intended to be comprehensive.[3] Moreover, the analysis provides that the term "handicapped individual" is not limited to persons "who have those severe, permanent or progressive conditions that are most commonly regarded as handicaps."[4] As one court has noted, the legislative history of the Act gives "fair warning" that the term "impairment" means " 'any condition which weakens, diminishes, restricts, or otherwise damages an individual's health or physical or mental activity.' "[5] Notwithstanding this fairly broad definition of the term "handicap," the courts have been called upon to resolve numerous disputes regarding what constitutes a physical or mental impairment. The major issues of controversy are as follows:

A. Contagious Diseases

One of the most hotly contested issues on this subject involved the question of whether an individual with a contagious disease has a physical impairment within the meaning of Section 504. The leading case addressing this question is *School Board of Nassau County v. Arline*.[6] The plaintiff in *Arline* had worked as a schoolteacher for 13 years before she suffered three relapses of tuberculosis in a two-year period after her disease had been in remission for 20 years. Following the third relapse Arline was fired from her job; subsequently Arline filed suit claiming that her dismissal violated Section 504. The threshold issue in *Arline* was whether tuberculosis—a communicable disease—should be considered a handicap. The district court held that a contagious disease such as tuberculosis is not a handicap within the meaning of Section 504.[7] The Eleventh Circuit reversed, noting that, in accord with the regulatory definition, one who has tuberculosis is afflicted with a disease that "can significantly impair respiratory functions as well as other major body systems."[8] That court further held that "[e]ven when not directly affected by tuberculosis, Arline falls within the coverage of Section 504 because she 'has a record of such an impairment, . . .' and is 'regarded as having such an impairment. . . .' "[9] The Supreme Court affirmed the Eleventh Circuit's ruling[10] on the ground that a person with tuberculosis, notwithstanding the fact that the disease is communicable, fits squarely within the "statutory and regulatory framework" of Section 504. The Court disagreed with the school district's contention that "the contagious effects of a disease can be meaningfully distinguished from the disease's physical effects on a claimant. . . ."[11] The Court noted that "Arline's contagiousness and her physical impairment each resulted from the same underlying condition, tuberculosis,"[12] and opined that "[i]t would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment."[13]

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[2] 45 C.F.R. §84.3(j)(2)(i) (1989).

[3] 45 C.F.R. Part 84 App. A 346 (1989).

[4] *Id.*

[5] *Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1098 (D. Haw. 1980). While *Black v. Marshall* was filed under Section 503 of the Rehabilitation Act, rather than under Section 504 (*see* chapter 9 of this text, *infra*), the definition of the term "handicapped individual" is the same under both statutes.

[6] 480 U.S. 273, 107 S. Ct. 1123 (1987).

The *Arline* decision was anxiously awaited by disability rights activists who were concerned about the discriminatory treatment accorded persons with Acquired Immune Deficiency Syndrome (AIDS) or AIDS-Related Complex (ARC). Prior to the Supreme Court's ruling in *Arline* the United States Department of Justice (DOJ) took the position that persons with AIDS or ARC who were discriminated against due to fear of contagion were not handicapped within the meaning of Section 504.[14] The DOJ opined that Congress did not intend Section 504 to reach discrimination based on the communicability of a disease. Under the DOJ's widely publicized opinion, therefore, employers or program administrators could discriminate at will against persons with AIDS or ARC based on the irrational fear of contagion via casual contact.

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[7] *Arline v. School Board of Nassau County*, 692 F. Supp. 1286 (M.D. Fla. 1988).

[8] *Arline v. School Board of Nassau County*, 772 F.2d 759, 764 (11th Cir. 1985), *aff'd*, 480 U.S. 273, 107 S. Ct. 1123 (1987).

[9] *Id.*

[10] *See* note 8 of this chapter, *supra*.

[11] 480 U.S. at 282, 107 S. Ct. at 1128.

[12] *Id.*

[13] *Id.* (footnote omitted).

[14] Charles J. Cooper, Memorandum for Ronald E. Robertson, General Counsel, HHS, Re: Application of Section 504 of the Rehabilitation Act to Persons with AIDS, AIDS-Related Complex; or Infection with the AIDS Virus (June 20, 1986).

In *Arline* the Court specifically declined to rule on the AIDS question.[15] The Court explicitly stated, however, that "[a]llowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of Section 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or ignorance of others."[16] Subsequent to the Supreme Court's ruling in *Arline*, therefore, DOJ changed its position with respect to the question of whether persons with AIDS or ARC are handicapped under Section 504. In a 1988 opinion[17] DOJ concluded that "Section 504 protects symptomatic and asymptomatic [AIDS]-infected individuals against discrimination in any covered program or activity on the basis of any actual, past or perceived effect of [AIDS] infection that substantially limits any major life activity. . . ."[18]

Moreover, following the *Arline* decision, several courts have held that persons with AIDS are handicapped individuals within the meaning of Section 504.[19] And at least one court has held that asymptomatic AIDS carriers may be handicapped within the meaning of Section 504 if they are treated differently due to the misconceptions of others. In *Doe v. Centinela Hospital*[20] an asymptomatic AIDS-infected individual claimed to have been discharged from a hospital because staff members were afraid they would become infected with AIDS. The court held that the plaintiff was a handicapped individual for purposes of Section 504.

It is important to note, however, that when enacting the Civil Rights Restoration Act to expand the scope of Section 504 coverage,[21] Congress qualified the definition of the term "handicapped individual" in the employment context. The amended definition provides:

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[15] *See* 480 U.S. at 282 n.7, 107 S. Ct. at 1128 n.7. The Court stated:

> . . . This case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act.

[16] 480 U.S. at 284, 107 S. Ct. at 1129.

[17] Memorandum for Arthur B. Culvahouse, Jr., Counsel to the President, "Re: Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals," 2 *BioLaw* 21 (December 1988).

[18] *Id.* at 1 (footnotes omitted).

[19] *See, e.g., Chalk v. United States, et al.*, 840 F.2d 701 (9th Cir. 1988) (teacher with AIDS is a handicapped individual within the meaning of Section 504); *Thomas v. Atascadero Unified School District*, 662 F. Supp. 376 (C.D. Cal. 1987) (school child with AIDS is a handicapped individual under Section 504); *Doe v. Dolton Elementary School District No. 148*, 694 F. Supp. 440 (N.D. Ill. 1988) (preliminary injunction granted; court determined that a student with AIDS was likely to be considered a handicapped individual under Section 504).

[20] 57 U.S.L.W. 2034, 1988 WL 81776 (C.D. Cal. 1988).

[21] *See* text at note 94 of chapter 3, *supra*.

> For the purpose of Sections 503 and 504, as such sections relate to employment, [the term "individual with handicaps"] does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.[22]

This amendment, in essence, merely restates the obvious: To be protected under Section 504, a handicapped individual must be "otherwise qualified" for the position (or program) at issue. Pursuant to the amendment, an individual with a contagious disease who constitutes a threat to others or who is unable to perform the duties of a job is not "otherwise qualified" for that job. Although couched in terms of the definition of a handicapped individual, the amendment actually codifies the "otherwise qualified" standard, which is discussed in chapter 5 of this text.

B. Scope of the Term "Physical Impairment"

The courts have generally concluded that to fall within the ambit of Section 504 an individual's purported physical handicap must substantially *impair* performance as opposed to constituting a mere physical characteristic.[23] Thus, courts have held that such physical characteristics as left-handedness,[24] height or strength capabilities,[25] crossed eyes,[26] and vision difficulties that prevent passage of an examination requiring vision better than 20/30 without the assistance of corrective lenses[27] do not constitute a handicap. Similarly, infancy, in and of itself, has been held not to constitute a handicap under Section 504.[28]

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[22] 29 U.S.C.A. §706(8)(c) (West Supp. 1990).

[23] The obvious physical conditions recognized as constituting a handicap under Section 504 include:

a. *Deafness: E.g., Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *University of Texas v. Camenisch*, 451 U.S. 390 (1981); *Crawford v. University of North Carolina*, 440 F. Supp. 1047 (M.D.N.C. 1977); *Barnes v. Converse College*, 436 F. Supp. 635 (D.S.C. 1977).

b. *Blindness: E.g., Gurmankin v. Costanzo*, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977), *cert. denied*, 450 U.S. 923 (1981); *Norcross v. Sneed*, 573 F. Supp. 533 (W.D. Ark. 1983), *aff'd*, 755 F.2d 113 (8th Cir. 1985).

c. *Diabetes: E.g., Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985); *Bentivegna v. United States Department of Labor*, 694 F.2d 619 (9th Cir. 1982); *Serrapica v. New York*, 708 F. Supp. 64 (S.D.N.Y. 1989), *aff'd*, 888 F.2d 126 (2d Cir. 1989); *Davis v. Meese*, 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3d Cir. 1989); *Martin v. Cardinal Glennon Memorial Hospital for Children*, 599 F. Supp. 284 (E.D. Mo. 1984).

d. *Crohn's Disease: E.g., Kling v. County of Los Angeles*, 769 F.2d 532 (9th Cir. 1985), *rev'd on other grounds*, 474 U.S. 936 (1985); *Jones v. Hodel*, 711 F. Supp. 1048 (D. Utah 1989).

e. *Multiple Sclerosis: E.g., Carter v. Casa Central*, 849 F.2d 1048 (7th Cir. 1988); *Puskin v. Regents of the University of Colorado*, 658 F.2d 1372 (10th Cir. 1981); *Hutchings v. Erie City and County Library Board of Directors*, 516 F. Supp. 1265 (W.D. Pa. 1981).

Further, it has been consistently held that transitory or minor illnesses or conditions do not constitute a handicap within the meaning of Section 504. Courts

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f. *Paralysis: E.g., Ross v. Hilltop Rehabilitation Hospital*, 676 F. Supp. 1528 (D. Colo. 1987); *Lloyd v. Illinois Regional Transportation Authority*, 548 F. Supp. 575 (N.D. Ill. 1982); *ADAPT v. Skinner*, 881 F.2d 1184 (3d Cir. 1989).

g. *Cerebral Palsy: E.g., Smith v. U.S. Postal Service*, 742 F.2d 257 (6th Cir. 1984); *Bolthouse v. Continental Wingate Co.*, 656 F. Supp. 620 (W.D. Mich. 1987); *Phipps v. New Hanover County Board of Education*, 551 F. Supp. 732 (E.D.N.C. 1982). *But see*, *Pridemore v. Legal Aid Society*, 625 F. Supp. 1171 (S.D. Ohio 1985) (person with *mild* cerebral palsy not handicapped because "substantial limitation" test not satisfied).

h. *Epilepsy: E.g., Costner v. United States*, 720 F.2d 539 (8th Cir. 1983); *Drennon v. Philadelphia General Hospital*, 428 F. Supp. 809 (E.D. Pa. 1977); *Beam v. Sun Shipping and Drydock*, 679 F.2d 1077 (2d Cir. 1981).

i. *Learning Disabilities: E.g.,Victoria L. v. District School Board of Lee County*, 741 F.2d 369 (11th Cir. 1984); *Powell v. Defore*, 699 F.2d 1078 (11th Cir. 1983); *Hessler v. State Board of Education*, 700 F.2d 134 (4th Cir. 1983).

j. *Cardiac Problems: E.g., Bailey v. Tisch*, 683 F. Supp. 652 (S.D. Ohio 1988); *Bento v. I.T.O. Corp.*, 599 F. Supp. 731 (D.R.I. 1984); *Walker v. United States Attorney General*, 572 F. Supp. 100 (D.D.C. 1983).

k. *Alcoholism: E.g., Anderson v. University of Wisconsin*, 841 F.2d 737 (7th Cir. 1988); *Le Strange v. Consolidated Rail Corp.*, 687 F.2d 767 (3d Cir. 1982), *aff'd sub nom., Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984); *Pierce v. Engle*, 726 F. Supp. 1231 (D. Kan. 1989); *Schroeder v. City of Chicago*, 715 F. Supp. 222 (N.D. Ill. 1989).

[24] *de la Torres v. Bolger*, 781 F.2d 1134 (5th Cir. 1986) (being left-handed is a characteristic, not an impairment).

[25] *Jasany v. United States Postal Service*, 755 F.2d 1244, 1249 (6th Cir. 1985) ("[c]haracteristics such as average height or strength that render an individual incapable of performing particular jobs are not covered by [Section 504] because they are not impairments' "; *Tudyman v. United Airlines*, 608 F. Supp. 739, 746 (C.D. Cal. 1984) (inability to meet weight requirement not a physical disability).

Dwarfism, however, has been held to constitute a handicap within the meaning of Section 504. *See Dexler v. Tisch*, 660 F. Supp. 1418 (D. Conn. 1987) (dwarfism is a handicap because it substantially interfered with the plaintiff's ability to work).

[26] *Jasany v. United States Postal Service*, 755 F.2d 1244 (6th Cir. 1985) (a mild case of strabismus, commonly known as crossed eyes, does not constitute a handicap under Section 504 because it did not substantially interfere with a major life activity).

[27] *Trembczsynski v. Calumet City, et al.*, No. 87-C-0961, slip op. (N.D. Ill. August 28, 1987) (available on Lexis genfed library) ("[b]eing slightly myopic is a physical characteristic, not a chronic illness, a disorder or deformity, a mental disability, or a condition affecting plaintiff's health. It is not an 'impairment' as contemplated by [Section 504]").

[28] *Gerben v. Holsclaw*, 692 F. Supp. 557 (E.D. Pa. 1988) (infancy is not a condition of incompetence within the meaning of Section 504).

have found that no handicap existed in cases in which plaintiffs claimed discrimination based on minor pulmonary problems or irritation resulting from tobacco smoke,[29] transitory illnesses,[30] pregnancy,[31] or a fractured ankle.[32] All injuries or illnesses that may not necessarily be permanent, however, are not automatically "transitory" ills that fall outside the scope of Section 504. By way of example, in *Perez v. The Philadelphia Housing Authority*[33] the plaintiff sustained back and leg injuries in a fall at work. The defendant alleged that the plaintiff's injury was merely "transitory back pain" rather than a "commonly recognized handicap," and that consequently the plaintiff's claim fell outside the scope of Section 504.[34] The court disagreed. The court noted that the plaintiff's back problems caused her considerable pain, which in turn substantially affected her ability to be employed.[35]

An interesting question in this regard is whether obesity should be viewed as a physical handicap under Section 504. No cases have been found in which this issue has been addressed,[36] although several commentators have suggested that obesity should be considered a handicap for purposes of the Act.[37] It has been stated that the United States Department of Health and Human Services (DHHS) does not consider obesity, in and of itself, a handicap for purposes of Section 504, but that DHHS is waiting for the courts to define the contours of Section 504 with respect to this question.[38] In administrative proceedings, however, some individuals have made headway in claiming discrimination where it has been shown that their obesity is related to another demonstrable medical condition.[39]

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[29] *GASP v. Mecklenburg County*, 42 N.C. App. 225, 256 S.E. 2d 477 (N.C. App. 1979) (the term "handicapped" does not mean "people with any pulmonary problem, however minor, or all people who are harmed or irritated by tobacco smoke").

An individual who is hypersensitive to tobacco smoke and unable to function except in a smoke-free environment, however, has been held to be handicapped within the meaning of Section 504. *See Vickers v. Veterans Administration*, 549 F. Supp. 85 (W.D. Wa. 1982) (*see* text with note 73, *infra*); *Kamen v. American Telephone & Telegraph Co.*, 791 F.2d 1006 (2d Cir. 1986).

[30] *Stevens v. Stubbs*, 576 F. Supp. 1409, 1414 (N.D. Ga. 1983) (the court noted that plaintiff was physically fit to perform the job at issue but required excessive sick leave due to his transitory illness).

[31] *Saffer v. Town of Whitman*, 1986 WL 14090 (D. Mass. 1986) ("a temporary condition, such as pregnancy, is not a disability under [Section 504]").

[32] *Grimard v. Carlston*, 567 F.2d 1171 (1st Cir. 1978) (temporary incapacity not a handicap under Section 504).

[33] 677 F. Supp. 357 (E.D. Pa. 1987), *aff'd*, 841 F.2d 1120 (3d Cir. 1988).

[34] 677 F. Supp. at 360.

[35] For a discussion of the "substantial limitation" issue, *see* section V of this chapter, *infra*.

[36] In *Russell v. Salve Regina College*, 649 F. Supp. 391, 396 (D.R.I. 1986), plaintiff claimed that she had been unlawfully suspended from a nursing program because of her chronic weight problem. The plaintiff sought damages under several theories, including Section 504. The Section 504 claim was dismissed due to the court's finding that the college was not a recipient of federal financial assistance. Thus the question of whether plaintiff was handicapped was not addressed.

[37] *See, e.g.*, Note, "The Rehabilitation Act of 1973: Protection for Victims of Weight Discrimination?," 29 *U.C.L.A. Law Review* 947, 962-63 (1982) (hereinafter *UCLA Law Review*); Note, "What's a Handicap Anyway? Analyzing Handicap Claims Under the Rehabilitation Act of 1973 and Analogous State Statutes," 22 *Willamette Law Review* 529 (1986).

C. Scope of the Term "Mental Impairment"

In addition to the obvious mental disorders, such as in cases where the plaintiff has been diagnosed as suffering from mental illness or mental retardation, courts have considered some interesting questions when determining whether persons are mentally handicapped within the meaning of Section 504. Generally, where the condition at issue is recognized by medical authorities as constituting a mental impairment, the courts will give weight to that recognition.

In *Rezza v. United States Department of Justice*,[40] for example, when holding that compulsive gambling constitutes a handicap under Section 504, the court relied on the fact that the Diagnostic Manual of the American Psychiatric Association classifies "pathological gambling" as a mental disorder. And, in *Blackwell v. United States Department of the Treasury*[41] the court relied in part on the fact that transvestitism "is recognized by the American Psychiatric Association as a mental disorder" when holding that transvestitism constitutes a handicap under Section 504.[42] In *Daley v. Koch*,[43] however, the Second Circuit held that an applicant who was determined by a police department psychologist to exhibit poor judgment, irresponsible behavior and poor impulse control—personality traits deemed unacceptable for a police officer—was not mentally impaired. Because the applicant was not diagnosed as having a psychological illness or disorder, he was held not to be a handicapped individual under Section 504.

III. Having a Record of an Impairment

Section 504 is intended to protect those individuals who may once have suffered from a physical or mental disability but who no longer suffer from that disability.

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[38] *UCLA Law Review*, note 37 *supra*, at 962-63.

[39] *Id.*

[40] 46 Fair Empl. Prac. Cas. (BNA) 1369 (E.D. Pa. 1988).

[41] 639 F. Supp. 289 (D.D.C. 1986).

[42] 639 F. Supp. at 290. Homosexuality (*i.e.*, one's sexual orientation or preference), however, does not constitute a handicap under Section 504. *See* 45 C.F.R. Part 84 App. A 344 (1987) ("environmental, cultural and economic disadvantages are not in themselves covered [by Section 504]; nor are prison records, age, or homosexuality"); *Blackwell v. U.S. Department of Treasury*, 830 F.2d 1183 (D.C. Cir. 1987).

[43] 892 F.2d 212 (2d Cir. 1989).

Thus, the statutory definition of a handicapped individual includes those persons who have "a record of" a disability. The regulations promulgated pursuant to Section 504 by the United States Department of Justice (DOJ), the DOE, the DOL and the DHHS provide that the term " '[h]as a record of such an impairment' means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities."[44] The DOE and DHHS explanatory sections of the regulations provide that "[f]requently occurring examples of the first group are persons with histories of mental or emotional illness, heart disease, or cancer; of the second group, persons who have been misclassified as mentally retarded."[45]

Under this definition, a former cancer patient whose cancer has been cured, or an individual who was once, but no longer is, mentally ill, may not be discriminated against solely on the basis of handicap. Thus, for example, in *Duran v. City of Tampa*[46] the court held that an individual who was treated by a prospective employer as having epilepsy was handicapped under Section 504, notwithstanding the fact that while the individual did once suffer from childhood epilepsy he had since outgrown that disability. And, in *School Board of Nassau County v. Arline*, the Supreme Court concluded that an individual having a record of tuberculosis fell within this statutory definition.[47]

IV. Regarded as Being Handicapped

In addition, an individual may be handicapped within the meaning of Section 504 even if he or she does not actually suffer from a physical or mental impairment that substantially limits a major life activity, if he or she is "regarded as having such an impairment."[48] The phrase "regarded as having an impairment" has been defined as meaning:

> (1) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a

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[44] 28 C.F.R. §41.31(b)(3) (1989) (DOJ regulation); 34 C.F.R. §104.3(j)(2)(iii) (1989) (DOE regulation); 29 C.F.R. §32.3(c)(2)(b)(5)(ii) (1989) (DOL regulation); 45 C.F.R. §84.3(j)(2)(iii) (1989) (DHHS regulation).

[45] 34 C.F.R. Part 104 App. A 366 (1987) (DOE regulation); 45 C.F.R. Part 84 App. A 345 (1987) (DHHS regulation).

[46] 430 F. Supp. 75 (M.D. Fla. 1977).

[47] 480 U.S. 273, 107 S. Ct. 1123 (1987). *See also*, *Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978) (rehabilitated drug abusers had a "record of" an impairment within the meaning of Section 504).

[48] *Id.* 29 U.S.C.A. §706(8)(A) (West Supp. 1990).

> limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others towards such impairment; or (3) has none of the impairments [cited as falling within the scope of Section 504] . . . but is treated by a recipient as having such an impairment.[49]

The purpose of this rule is to protect persons who have minor impairments that do not affect their ability to perform, or who in fact have no *real* impairment at all, from being prejudiced by the unrealistic or stereotypical attitudes of others. As the Supreme Court stated in *Southeastern Community College v. Davis:*

> A person who has a record of, or is regarded as having, an impairment may at present have no actual incapacity at all. Such a person would be exactly the kind of individual who could be "otherwise qualified" to participate in covered programs [under Section 504]. And a person who suffers from a limiting physical or mental impairment still may possess other abilities that permit him to meet the requirements of various programs. Thus it is clear that Congress included among the class of "handicapped" persons covered by Section 504 a range of individuals who could be "otherwise qualified" [to participate in covered programs under Section 504].[50]

As noted by the Supreme Court in *School Board of Nassau County v. Arline*, a person might be handicapped within the meaning of Section 504 as the result of some visible impairment that had no effect on the individual's physical or mental capabilities but which nevertheless might "substantially limit that person's ability to work as a result of the negative reactions of others to the impairment."[51] Examples of situations in which this might occur include situations involving burn victims with visible scars or hearing-aid users whose hearing impairments have been fully corrected by the use of aids.

In accord with this reasoning, in *Blackwell v. United States Department of the Treasury* the court held that the plaintiff properly stated a claim under Section 504 when he alleged that his employer "regarded the fact that he is a transvestite as a handicap."[52] Conversely, the court rejected the plaintiff's claim in *Forrisi v. Bowen*[53] that the defendant regarded the plaintiff's acrophobia as a handicap. The Fourth Circuit held that "an employer does not necessarily regard an employee as handicapped simply by finding the employee to be incapable of satisfying the singular demands of a particular job."[54] Rather, the employer must regard the "employee as handicapped in his or her ability to work by finding the employee's impairment to foreclose generally the type of employment involved."[55] Because the employer did not regard the plaintiff's acrophobia as substantially limiting the plaintiff's ability to be employed, the court held that the plaintiff was not regarded as having an impairment that substantially limited a major life activity.[56]

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[49] 45 C.F.R: §84.3(j)(2)(iv) (1989) (DHHS regulation); 34 C.F.R. §104.3(j)(2)(iv) (1989) (DOE regulation); 29 C.F.R. §33.3(d) (1989) (DOL regulation); 28 C.F.R. §41.31(b)(4) (1989) (DOJ regulation).

[50] 442 U.S. 397, 405 n.6, 99 S. Ct. 2361, 2366 n.6 (1979).

[51] 480 U.S. at 283, 107 S. Ct. at 1129.

[52] 639 F. Supp. 289, 290 (D.D.C. 1986). *See also, Kohl v. Woodhaven Learning Center*, 672 F. Supp. 1226, 1237 (W.D. Mo. 1987) (hepatitis B carrier regarded by employer as handicapped for purposes of Section 504); *Stevens v. Stubbs*, 576 F. Supp. 1409, 1414 (N.D. Ga. 1983) (person with undisclosed transitory illnesses requiring frequent absences from employment not regarded by employer as being handicapped within the meaning of Section 504); *Doe v. Centinela Hospital*, No. CV87-2514 PAR(PX), slip op. (C.D. Cal. June 30, 1988) (available on Lexis genfed library) (residential school and drug rehabilitation program perceived patient with AIDS as being handicapped); *Mahoney v. Ortiz*, 645

V. Substantial Limitation of a Major Life Activity

To ensure that only persons with significant impairments are protected from discrimination under Section 504, Congress provided that a physical or mental impairment constitutes a handicap under Section 504 only when that impairment "substantially limits a major life activity" of the individual. The question of what constitutes a "substantial limitation" of a major life activity has been widely litigated.

F. Supp. 22 (S.D.N.Y. 1986) (police department regarded applicant who had suffered several shoulder dislocations as being handicapped).

[53] 794 F.2d 931 (4th Cir. 1986).

[54] 794 F.2d at 934.

[55] 794 F.2d at 935.

[56] It has been argued that if an associate of someone with AIDS is perceived by a recipient of federal financial assistance as having a physical impairment—due to the recipient's fear that the associate is contagious or will contract the disease and be unable to perform, such person would be "handicapped" within the meaning of Section 504. In *Leckelt v. Board of Commissioners of Hospital District No. 1, Terrebonne Parish*, No. 86-4235, slip op. (E.D. La., March 15, 1989), a state hospital required a healthy nurse whose roommate had AIDS to take and submit results of an AIDS test. The nurse refused to produce the test results. Consequently, the hospital prohibited the nurse from returning to work. The nurse filed a complaint with the Office of Civil Rights of the Department of Health and Human Services (OCR) under Section 504, claiming that the hospital regarded him as being handicapped. The OCR agreed with the plaintiff. On December 13, 1989 the OCR ruled that "[t]he evidence gathered clearly indicates that [the hospital] treated the complainant as if he were infected with [AIDS]." [OCR Opinion, December 13, 1989] Thus, the OCR held that Leckelt was "regarded as" being handicapped under Section 504. [DHHS OCR Opinion, *Terrebonne General Medical Center*, OCR Docket No. 06-87-2001, 4 (December 13, 1989).] On appeal of the OCR's decision, the district court disagreed. The court held that Leckelt had failed to prove that his discharge was based on a perceived handicap. The court stated that "[t]he fact that the hospital repeatedly insisted that the nurse produce his test results flies in the face of a conclusion that it perceived him as [having AIDS]." Slip op. at 19.

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A. Major Life Activity

The term "major life activity" is held to mean "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[57] This list is intended to be "representative rather than exhaustive."[58] Thus, in *Oesterling v. Walters* the court recognized that "standing and sitting" constitute major life activities despite the fact that those items are not included among the enumerated activities.[59]

B. Substantial Limitation

In the employment context, the regulations specifically provide that "working" constitutes a major life activity.[60] Thus, courts have recognized that interference with the ability to work constitutes a substantial limitation of a major life activity.[61] Several courts, however, have considered the question of whether the inability to work at one particular job, or at a narrow range of jobs, constitutes a substantial limitation of the ability to work. In the leading case on this issue, *Black, Ltd. v. Marshall*,[62] the court rejected the argument that in order to satisfy the substantial impairment test "an individual would have to have an impairment 'likely to affect his employability *generally*.' "[63] The court stated:

> The Court believes that this type of definition drastically reduces the coverage of the Act, and undercuts the purposes for which the Act was intended. A

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[57] 45 C.F.R. §84.3(j)(2)(ii) (1989).

[58] *Oesterling v. Walters*, 760 F.2d 859, 860 (8th Cir. 1985).

[59] 760 F.2d at 861.

[60] 45 C.F.R. §84.3(j)(2)(ii) (1989) (DHHS regulation). *See* text at note 51 of this chapter, *supra*.

[61] *See, e.g., Franklin v. United States Postal Service*, 687 F. Supp. 1214, 1217 (S.D. Ohio 1988) (plaintiff's paranoid schizophrenia interfered with her ability to work and thus substantially limited a major life activity); *Arneson v. Heckler*, 1988 WL 42351 (E.D. Mo. 1988), *rev'd on other grounds*, 879 F.2d 393 (8th Cir. 1989) (plaintiff's apraxia, which impaired his motor skills and coordination, interfered with his ability to work and thus substantially limited a major life activity); *Coley v. Secretary of the Army*, 689 F. Supp. 519, 521 (D. Md. 1987) (plaintiff's osteoarthritis, which caused lifting restrictions and the inability to work on slippery surfaces, interfered with his ability to work and thus substantially limited a major life activity); *Blackwell v. United States Department of the Treasury*, 639 F. Supp. 289 (D.D.C. 1986) (plaintiff's transvestitism interfered with his ability to work due to the negative reactions of others and thus substantially limited a major life activity); *Carty v. Carlin*, 623 F. Supp. 1181, 1184 (D. Md. 1985) (plaintiff's back problems, which caused lifting difficulties, interfered with his ability to work and thus substantially limited a major life activity). Although some of these cases were filed under Section 501 of the Rehabilitation Act [*see* chapter 9 of this text, *infra*], sometimes in conjunction with claims under Section 504, the "substantial limitation of a major life activity" provision is applicable under both statutes.

[62] 497 F. Supp. 1088 (D. Haw. 1980). *See* note 5 of this chapter, *supra*.

[63] 497 F. Supp. at 1099 (emphasis in original).

> person, for example, who has obtained a graduate degree in chemistry, and is then turned down for a chemist's job because of an impairment, is not likely to be heartened by the news that he can still be a streetcar conductor, an attorney or a forest ranger. A person who is disqualified from employment in his chosen field has a substantial handicap to employment, and is substantially limited in one of his major life activities. The definitions contained in the Act are personal and must be evaluated by looking at the particular individual. A handicapped individual is one who "has a physical or mental disability *which for such individual* constitutes or results in a substantial handicap to employment. . . ." (emphasis added). It is the impaired individual that must be examined, and not just the impairment in the abstract.[64]

The *Black* court held that the focus must be on the individual job seeker, and not solely on the impairment or perceived impairment. According to that court, factors to look at when determining whether a major life activity has been substantially limited include: (1) the number and types of jobs from which the individual is disqualified due to the impairment; (2) the geographical area to which the applicant or employee has reasonable access; and (3) the job expectations and training of the individual. Applying that test, the court found the plaintiff in *Black* to be handicapped, because his impairment (a back injury) prevented him from being employed as a journeyman carpenter—a major subfield of a field of employment.

While purporting to follow the test set forth in *Black*, several courts have held that the inability to perform in a single job or single type of job due to a physical or mental impairment does not constitute a substantial limitation of the ability to work. In *Jasany v. United States Postal Service*[65] the court held that an eye impairment that prohibited the plaintiff from operating a letter sorting machine was not a handicap under Section 504. The court held that "[a]n impairment that affects only a narrow range of jobs can be regarded either as not reaching a major life activity or not as substantially limiting one."[66] And, in *Wright v. Tisch*[67] the court held that an allergy that restricted the plaintiff from working in an environment where a large amount of dust is present did not substantially limit a major life activity, despite the fact that the plaintiff was unable to continue her job at the computer forwarding system (CFS) of the Post Office. The court stated that the plaintiff was "not precluded from working indoors where a moderate amount of dust is present, and she is not restricted from outdoor employment. Plaintiff's allergy restricts her only from the unusual, if not unique, environmental conditions of the CFS."[68]

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[64] *Id.* (emphasis in original).

[65] 755 F.2d 1244 (6th Cir. 1985).

[66] 755 F.2d at 1249 n.3.

[67] 45 Fair Empl. Prac. Cas. (BNA) 151 (E.D. Va. 1987).

[68] *Id.* at 152-53.

Other courts have followed similar reasoning.[69] As one court has stated, "[t]he regulations define major life activity as . . . 'working,' . . . but not 'working at the specific job of plaintiff's choice.' "[70] As stated by another court, "the very concept of an impairment implies a characteristic that is not commonplace and that poses for the particular individual a more general disadvantage in his or her search for satisfactory employment."[71]

The "significant limitation" requirement has been discussed by other courts. In *Pridemore v. Rural Legal Aid Society of West Central Ohio*[72] the court held that an individual with mild or borderline cerebral palsy was not handicapped within the meaning of Section 504 because the effects of the illness did not interfere with the individual's ability to practice his profession. To the converse, in *Vickers v. The Veterans Administration*[73] the court held that an individual whose unusual sensitivity to tobacco smoke prevented him from working in an environment that is not completely smoke free *was* substantially limited in a major life activity. The common theme underlying all of the court decisions on this subject is that the impairment must be substantial and somewhat unique rather than commonplace. As stated by one court:

> The Rehabilitation Act assures that truly disabled, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the insurmountability of their handicaps. It would debase this high

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[69] *See, e.g., de la Torres v. Bolger,* 610 F. Supp. 593, 596-97 (N.D. Tex. 1985) ("[a]n impairment that interferes with an individual's ability to do a particular job, but does not significantly decrease that individual's ability to obtain satisfactory employment otherwise is not 'substantially limiting' for purposes of the Rehabilitation Act"); *McCleod v. City of Detroit,* 39 Fair Empl. Prac. Cas. (BNA) 225, 228 (E.D. Mich. 1985) ("being a firefighter" held not a major life activity because " 'one particular job for one particular employer cannot be a major life activity' "); *Tudyman v. United Airlines,* 608 F. Supp. 739, 745 (C.D. Cal. 1984) ("[t]here is . . . no authority for the proposition that failure to qualify for a single job because of some impairment that a plaintiff would otherwise be qualified to perform constitutes being limited in a major life activity"); *Elstner v. Southwestern Bell Telephone Co.,* 659 F. Supp. 1328 (S.D. Tex. 1987), *aff'd,* 863 F.2d 881 (5th Cir. 1988) (knee problem that prevented plaintiff from climbing poles and thus serving as a telephone lineman held not to constitute a significant impairment of the ability to work); *Fields v. Lyng,* 705 F. Supp. 1134, 1137 (D. Md. 1988), *aff'd,* 888 F.2d 1385 (1989) (borderline personality disorder that caused anxiety over travel which interfered with plaintiff's job did not significantly impair the ability to work because only a narrow range of jobs was affected); *Daley v. Koch,* 892 F.2d 212, 215 (2d Cir. 1989) ("[b]eing declared unsuitable for the particular position of police officer is not a substantial limitation of a major life activity").

The same reasoning has been held to apply when a plaintiff claimed that his employer *perceived* him as handicapped. See *Forrisi v. Bowen,* 794 F.2d 931, 934 (4th Cir. 1986) (an employer does not necessarily regard an employee as handicapped simply by finding the employee to be incapable of satisfying the singular demands of a particular job).

[70] *Tudyman v. United Airlines,* 608 F. Supp. 739, 745 (C.D. Cal. 1984).

[71] *Forrisi v. Bowen,* 794 F.2d 931, 933 (4th Cir. 1986).

[72] 625 F. Supp. 1180 (S.D. Ohio 1985).

[73] 549 F. Supp. 85 (W.D. Wash. 1982).

> purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared.[74]

VI. Alcoholics and Drug Abusers

While alcoholics and drug abusers are considered handicapped under Section 504, that section does not protect alcoholics or drug abusers "whose current use of alcohol or drugs prevents such individuals from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to the property or the safety of others."[75] Thus, it has been held that Section 504 protects only those alcoholics or drug abusers "who have been or are being rehabilitated,"[76] or "whose problems are under control."[77] Conversely, at least one court has held that drug or alcohol abusers who have been rehabilitated, or who are undergoing a successful rehabilitation program, are handicapped for purposes of Section 504 analysis.[78] The mere fact that an alcoholic or drug abuser is found to be undergoing rehabilitation and thus to satisfy the threshold test of having a handicap, however, does not mean that the individual is "otherwise qualified" for the position or program at issue.[79]

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[74] *Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986).

[75] 29 U.S.C.A. §706(8)(A) (West Supp. 1990).

[76] *Burka v. New York City Transit Authority*, 680 F. Supp. 590, 597 (S.D.N.Y. 1988) (stating that Section 504 protects only "those otherwise qualified drug abusers who have been or are being rehabilitated," and holding that employees who tested positive for illegal drug use were not handicapped under Section 504 since they were not seeking treatment for their conditions). *See also, Davis v. Bucher*, 451 F. Supp. 791, 796 n.4 (E.D. Pa. 1978) (similar); *Heron v. McGuire*, 803 F.2d 67 (2d Cir. 1986) (non-rehabilitated heroin addict was not a handicapped individual under Section 504).

[77] *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575, 591 (9th Cir. 1988); *rev'd on other grounds*, ______ U.S. ______, 109 S. Ct. 1402 (1989) (the case was reversed because the Ninth Circuit held that the regulations violated the Fourth Amendment to the U.S. Constitution; the Supreme Court disagreed, and held that the drug testing did not violate the Fourth Amendment to the U.S. Constitution).

[78] *See, e.g., Johnson v. Smith*, 39 Fair Empl. Prac. Cas. (BNA) 1106 (D. Minn. 1985).

[79] The regulations promulgated by the Department of Health and Human Services provide that:

> The fact that drug addiction and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities. On the contrary, a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related to the person's drug addiction or alcoholism. In other words, while an alcoholic or drug addict may not be denied services or disqualified from employment solely because of his or her condition, the

Because only rehabilitated or rehabilitating drug abusers and alcoholics are protected under Section 504, it has been held that an employer's mandatory drug or alcohol testing of employees does not violate Section 504, at least where safety is an integral part of the job in question. In *Railway Labor Executives' Association v. Burnley*[80] the court held that regulations promulgated by the Federal Railroad Administration mandating blood and urine tests of employees after certain accidents and incidents, and authorizing breath and urine tests after certain accidents, incidents and rule violations, did not violate Section 504. The court noted that Section 504 "does not cover alcoholics or drug abusers whose employment, by reason of current alcohol or drug abuse, would constitute a threat to property or safety."[81] And, in *Burka v. New York City Transit Authority* the court held that a city transit authority's policy compelling employees and job applicants to submit urinalysis tests for detection of narcotics did not violate Section 504.[82]

The plaintiffs in *Burka* alleged that persons who receive positive test results are, or are perceived as being, drug abusers by the transit authority, and are thus protected handicapped persons under Section 504 and cannot be discharged or rejected for hire unless they are unable to perform their job-related duties or constitute a direct threat to public safety. In essence, therefore, the plaintiffs contended that "due to their use or perceived use of illegal narcotics, they [were] protected from adverse employment action as long as they. . . [could] continue to do the job in spite of their alleged 'handicap.' "[83] The court disagreed, and relied

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behavioral manifestations of the condition may be taken into account in determining whether he or she is qualified.

45 C.F.R. Part 84 App. A 346 (1987). *See, e.g., McCleod v. City of Detroit*, 39 Fair Empl. Prac. Cas. (BNA) 225 (E.D. Mich. 1985) (in view of evidence showing that the use of marijuana can adversely affect a firefighter's ability to do his job, a firefighter who tests positive for the presence of marijuana in his urine would not be otherwise qualified to be a firefighter even if he were found to be "handicapped" within the meaning of Section 504). *See also, Smith v. Ortiz*, 136 Misc. 2d 110, 517 N.Y.S. 2d 352 (Supp. 1987) (alcoholic probationary police officer not otherwise qualified to perform the duties of the job due to his refusal to acknowledge and accept treatment for his problem).

For a discussion of the "otherwise qualified" issue, *see* chapter 5 of this text, *infra*.

[80] 839 F.2d 575 (9th Cir. 1988); *rev'd on other grounds*, ______ U.S. ______, 109 S. Ct. 1402 (1989) (*see* note 77 of this chapter, *supra*).

[81] 839 F.2d at 591. The court further held that "[t]he regulations do not mandate any discriminatory treatment of those who are handicapped, or even of those who 'flunk' the drug or alcohol tests. Any disciplinary action is left up to the individual employers and is a subject for collective bargaining between the unions and railroads." *Id.*

[82] 680 F. Supp. 590 (S.D.N.Y. 1988). The *Burka* court did not discuss how to handle situations in which an individual who tests positive for narcotics claims that he is undergoing rehabilitation but that the drug has not yet had time to leave his blood system.

[83] 680 F. Supp. at 597.

on an exhaustive examination of legislative history of the 1978 amendments to the Rehabilitation Act when stating:

> Congress's meaning is clear—Sections 503 and 504 extend protection only to rehabilitated or rehabilitating drug abusers. This is consistent with sound public policy. It encourages those abusers of illegal narcotics who have not done so to seek treatment for their problem, but it does not provide those same abusers with the assurance of safe haven in the workplace should they instead choose to continue their illegal activity and ignore help.[84]

Any confusion over this issue was resolved by recent passage of the Americans with Disabilities Act of 1990 (ADA).[85] Section 512(a) of the ADA amends Section 7(8) of the Rehabilitation Act[86] to provide that "the term 'individual with handicaps' ": "does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use. . . ."[87] That section further provides as follows:

> (ii) Nothing in clause (i) shall be construed to exclude as an individual with handicaps an individual who—
>
> (I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
>
> (II) is participating in a supervised rehabilitation program and is no longer engaging in such use; or
>
> (III) is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in subclause (I) or (II) is no longer engaging in the illegal use of drugs.
>
> (iii) Notwithstanding clause (i), for purposes of programs and activities providing health services and services provided under title[s] I, II and III, an individual shall not be excluded from the benefits of such programs or activities on the basis of his or her current illegal use of drugs if he or she is otherwise entitled to such services.
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> (iv) For purposes of programs and activities providing educational services, local educational agencies may take disciplinary action pertaining to the use or possession of illegal drugs or alcohol against any handicapped student who

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[84] *Id.* at 600 (footnote omitted).

[85] S. 933, 101st Cong., 2d Sess. (1990), 136 *Cong. Rec.* H4596 (July 12, 1990). For a discussion of the ADA *see* chapter 12 of this text, *infra*.

[86] 29 U.S.C.A. §706(8) (West. Supp. 1990).

[87] ADA §512(a), 136 *Cong. Rec.* H4596 (July 12, 1990).

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> currently is engaging in the illegal use of drugs or in the use of alcohol against any handicapped student who currently is engaging in the illegal use of drugs or in the use of alcohol to the same extent that such disciplinary action is taken against nonhandicapped students. Furthermore, the due process procedures at 34 CFR 104.36 shall not apply to such disciplinary actions.[88]

Further the ADA provides that for purposes of Sections 503 and 504 of the Rehabilitation Act, insofar as those sections relate to employment, the term "individual with handicaps" "does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others."[89]

In codifying and clarifying the law, the ADA clearly explains that whether alcoholics or drug abusers are to be considered handicapped and entitled to the protection of Section 504 will depend on whether such individuals are seeking employment or access to services. Current drug users and abusers *are not* protected from being treated differently in the employment context under Section 504. They *are*, however, protected under Section 504 from being treated differently in other contexts, such as with respect to access to services.[90]

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[88] *Id.* 34 C.F.R. §104.36 (1989) is satisfied by compliance with 20 U.S.C. §1415. The due process procedures of the statute and regulations are discussed in chapter 13 of this text, *infra*.

[89] *Id.* The ADA further clarifies that, for purposes of Section 504, the term "illegal drugs" "does not include the use of a drug taken under supervision [of] a licensed health professional, or other uses authorized by the Controlled Substances Act [21 U.S.C. §812] or other provisions of Federal law." ADA §512(b), 136 *Cong. Rec.* H4596 (July 12, 1990).

[90] One other issue should be noted when discussing alcoholism and Section 504. In *Traynor v. Turnage*, 485 U.S. 535, 108 S. Ct. 1372 (1988), the Supreme Court considered whether a Veterans Administration (VA) regulation dealing with the subject of alcoholism violated Section 504. Under VA rules, veterans who have not exhausted their G.I. Bill educational assistance benefits within the ten years required under 38 U.S.C. §1662 (a)(1) may obtain an extension of the delimiting period if they were prevented from using their benefits earlier by "a physical or mental disorder which was not the result of [their] own willful misconduct." Veterans who sought to continue receiving benefits after the ten-year period on the ground that they were disabled by alcoholism for much of that period were precluded from doing so pursuant to a VA regulation defining "primary" alcoholism (alcoholism that is unrelated to an underlying psychiatric disorder) as "willful misconduct." Plaintiffs in *Traynor* alleged that labeling alcoholism as willful misconduct and thereby preventing alcoholics from receiving VA benefits constituted discrimination on the basis of handicap in violation of Section 504. A majority of the Supreme Court disagreed. First, the majority held that when extending Section 504's anti-discrimination prohibition to programs conducted by federal agencies, Congress did not evidence any intent to repeal the willful misconduct provision of Section 1662(a)(1). Second, the majority held that there is no inconsistency between Section 504 and a conclusive presumption that alcoholism not motivated by mental illness is willful. Further, the majority stated that "[t]here is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons must also be extended to all other categories of handicapped persons." 485 U.S. at 549, 108 S. Ct. at 1382.

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Section 504: "Reasonable Accommodations" for "Otherwise Qualified" Handicapped Individuals

I. Introduction

Section 504, by its express terms, protects only "otherwise qualified" handicapped persons.[1] Thus, a disabled individual who is not otherwise qualified for the job or program at issue cannot succeed on a Section 504 discrimination claim.

Employers and program administrators who receive federal financial assistance are required to provide "reasonable accommodations" for "otherwise qualified" handicapped individuals. The questions of what constitutes "reasonable accommodations" and whether a handicapped individual is "otherwise qualified" are among the most troublesome issues relating to Section 504. The two questions are inextricably intertwined. The relationship between the two factors is best stated as follows: A handicapped individual is protected from discrimination under Section 504 only if he or she is able to perform in the job or program at issue under existing conditions or with the provision of reasonable accommodations by the employer or program administrator. The derivation of this relationship is interesting.

In *Southeastern Community College v. Davis*[2] the Supreme Court held that an otherwise qualified handicapped individual within the meaning of Section 504 is one who is able to meet all of the program's requirements "in spite of" his or her handicap.[3] The Court recognized, however, that in some situations Section 504 requires that an existing program be modified to accommodate the needs of disabled people.[4] Subsequently, in *Alexander v. Choate*[5] the Court reinforced the need for reasonable accommodations by stating that "to assure meaningful access [under Section 504], reasonable accommodations in the grantee's program or benefit may have to be made."[6]

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[1] *See* text at note 1 of chapter 3, *supra*.

[2] 442 U.S. 397, 99 S. Ct. 2361 (1979).

[3] 442 U.S. at 406, 99 S. Ct. at 2367. In that case Davis, a hearing-impaired licensed practical nurse, was denied admittance to an Associate Degree nursing program because the college felt that, due to her

The interrelationship between the two requirements enunciated by the Supreme Court is clear. If the Court's ruling that an otherwise qualified handicapped individual must meet the requirements of the program in spite of his handicap were read literally—to require an examination of the handicapped person's qualifications without the provision of accommodations—Section 504, and consequently that Section's acknowledged reasonable accommodation requirement, would be rendered a nullity. Obviously, if a handicapped person must meet all of the requirements of a program in spite of his handicap and without the provision of accommodations, there is no need to address the issue of whether the requested accommodations are reasonable or unreasonable. The Supreme Court recognized this in *Alexander v. Choate* when it stated that "the question of who is 'otherwise qualified' and what actions constitute 'discrimination' under [Section 504] would seem to be two sides of a single coin; the ultimate question is the extent to which a grantee is required to make reasonable modifications in its programs for the needs of the handicapped."[7] Similarly, various regulations enacted pursuant to Section 504 dealing with employment practices expressly denote the interrelationship

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hearing disability, she would be unable to perform the duties of a registered nurse. The Court held that Davis was not discriminated against under Section 504 because she was not "otherwise qualified" for the program "in spite of" her hearing loss. 442 U.S. at 406-10, 99 S. Ct. at 2367-68. The Court decided that Davis was disqualified *because* she was hearing impaired, rather than deciding whether she met the requirements of a registered nursing candidate *apart from* her hearing impairment.

[4] The Court stated that "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory. Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of [the then U.S. Department of Health, Education and Welfare]." 442 U.S. at 412-13, 99 S. Ct. at 2370.

[5] 469 U.S. 287, 105 S. Ct. 712 (1985).

[6] 469 U.S. at 301, 105 S. Ct. at 720.

[7] 469 U.S. at 300 n.19, 105 S. Ct. at 720 n.19. *See also, School Board of Nassau County, Florida v. Arline*, 480 U.S. 273, 288 n.17, 107 S. Ct. 1123, 1131 n.17 (1987), 1986-87 EHLR 558:228, 235 n.17 (noting that in the employment context an "otherwise qualified handicapped person" is one who can perform " 'the essential functions' of the job in question," and stating that "[w]hen a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any 'reasonable accommodation' by the employer would enable the handicapped person to perform those functions").

between the otherwise qualified and reasonable accommodation requirements,[8] while regulations dealing with program accessibility implicitly, but not expressly, recognize that interrelationship.[9]

Although the otherwise qualified and reasonable accommodation issues are directly interrelated, the two issues must, of necessity, be decided separately. In the opinion of the authors, when a handicapped person claims to have been discriminated against in contravention of Section 504, the first question that should be asked is whether the individual is able to completely perform in the job or program at issue in spite of his or her handicap. When that question is answered in the affirmative, the only remaining question is whether discrimination has occurred. The handicapped individual is already otherwise qualified, and the issue of reasonable accommodations need not be addressed. When that initial question is answered in the negative, however, the issues of whether the individual is otherwise qualified and whether reasonable accommodations may—and thus must—be provided come into play. In such situations, the first question to be resolved should be that of reasonable accommodations. That is, if it is determined that a handicapped person, without the provision of accommodations, is unable to perform all of the requirements of a particular job or program or is unable to obtain the full benefit of a particular service,[10] the first question that should be addressed is whether reasonable accommodations may be provided to remedy the fact-

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[8] *See, e.g.*, 45 C.F.R. §84.3(k)(1) (1989) (DHHS regulation defining "qualified handicapped person" with respect to employment as "a handicapped person who, with reasonable accommodations, can perform the essential functions of the job in question"); 29 C.F.R. §32.3 (1989) (DOL Section 504 regulation defining a "qualified handicapped individual" for purposes of employment as one "who is capable of performing the essential functions of the job . . . with reasonable accommodation to his or her handicap").

[9] For example, the DHHS regulations dealing with "program accessibility" require a recipient to operate its programs "so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons," but note that a recipient is not required "to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons." [45 C.F.R. §84.22 (1989)] Similarly, with respect to postsecondary educational programs, the DHHS regulations require an educational institution to: (1) make modifications to its academic requirements that are not essential to the program of instruction to meet the special needs of handicapped students [45 C.F.R. §84.44(a) (1989)]; (2) provide auxiliary aids for students with impaired sensory, manual or speaking skills, such as interpreters for hearing-impaired students or readers for blind students—but not including "services of a personal nature" [45 C.F.R. §84.44(d) (1989)]; and (3) provide accessible housing for handicapped students to ensure that such housing," *as a whole*, [is] comparable to that of nonhandicapped students." [45 C.F.R. §84.45 (1989) (emphasis added)] These regulations embody the concept of reasonable accommodations although they do not use that specific language.

[10] Section 504 prohibits discrimination in all programs and services provided by recipients of federal financial assistance, not just services having admissions criteria such as postsecondary educational programs. Thus, for example, a hospital or social service agency that receives federal financial assistance must comply with Section 504 when providing services to handicapped people.

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specific problem.[11] If reasonable accommodations are found to be possible, the next issue to be resolved is: If provided with such accommodations will the handicapped individual be otherwise qualified for the job or program?

II. Reasonable Accommodations

At the outset, "reasonable accommodations" must be distinguished from "affirmative action." Affirmative action, which is aimed at remedying past discrimination, would require employers and program administrators affirmatively to seek to hire or accept handicapped persons. Section 504, however, does not contain an affirmative action requirement.[12] Rather, Section 504 merely requires that employers and program administrators reasonably accommodate handicapped persons to eliminate existing barriers. Unfortunately, the Supreme Court inadvertently created confusion about the relationship between these two concepts when it stated in *Southeastern Community College v. Davis* that Section 504 does not impose an "affirmative-action obligation on all recipients of federal funds."[13] In *Alexander v. Choate*, however, the Court clarified the distinction between affirmative action and reasonable accommodations.[14] The Court explained that when it stated in *Davis* that affirmative action is not required under Section 504, the Court simply meant that Section 504 does not require recipients of federal financial assistance to make *substantial* modifications to their programs to accommodate handicapped persons; all that is required is the provision of *reasonable* modifications.[15]

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[11] The issue of reasonable accommodations is fact-specific. *See, e.g.*, 45 C.F.R. Part 84 App. A, at 351 (1989) (Appendix to DHHS regulation promulgated under Section 504 noting that whether proposed accommodations are reasonable "will vary depending on the facts of a particular situation"); *Arline v. School Board of Nassau County*, 772 F.2d. 759, 764 (11th Cir. 1985), 1985-86 EHLR 557:150, 154 (issue of reasonable accommodations under Section 504 is "fact-specific"), *rev'd on other grounds*, 480 U.S. 273, 107 S. Ct. 1123 (1987), 1986-87 EHLR 558:228; *Brennan v. Stewart*, 834 F.2d 1248, 1260, 1262 (5th Cir. 1988) (whether a handicapped person is otherwise qualified is a question of fact; "since it is part of the 'otherwise qualified' inquiry, our precedent requires that the 'reasonable accommodation' question be decided as an issue of fact—meaning, of course, that it is one for the trial court or jury, subject to 'clearly erroneous' . . . review only").

[12] *See, e.g., Southeastern Community College v. Davis*, 442 U.S. 397, 411, 99 S. Ct. 2361, 2369 (1979) (Section 504 does not require affirmative action on behalf of handicapped persons, but only the absence of discrimination against such persons); *Bowen v. American Hospital Association*, 476 U.S. 610, 640, 106 S. Ct. 2101, 2119 (1986) (same); *Sabo v. O'Bannon*, 586 F. Supp. 1132, (E.D. Pa. 1984) (failure to develop treatment plan in lieu of institutionalization of retarded adult did not state a cause of action under Section 504 because that section has no affirmative action requirement).

[13] 442 U.S. at 411, 99 S. Ct. at 2369-70.

[14] 469 U.S. at 300 n.20, 105 S. Ct. at 721 n.20.

[15] *Id.*

In the employment context, reasonable accommodations are currently defined as those which would not impose an "undue hardship" on the operation of an employer's program.[16] When considering what constitutes an undue hardship, the majority of the current Section 504 regulations provide that the relevant factors include the size, type and budget of the employer's program and the nature and cost of the accommodation(s) required.[17] In the context of program accessibility, at least with respect to postsecondary education and similar programs, reasonable accommodations are held by the Supreme Court to be those that would not: (a) impose "undue financial and administrative burdens" on a grantee,[18] or (b) require "a fundamental alteration in the nature of [the grantee's] program."[19] Because these tests are necessarily subjective, the courts have reached conflicting results when defining the terms "undue hardship" and "fundamental alteration."

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[16] *See, e.g.*, 45 C.F.R. §84.12(a) (1989) (DHHS regulation providing that, in the context of employment, "[a] recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program"); 29 C.F.R. §32.3 (1989) (Department of Labor (DOL) regulation stating " 'Reasonable Accommodation' means the changes and modifications which can be made in the structure of a job or employment and training program, or in the manner in which a job is performed or an employment and training program is conducted, unless it would impose an undue hardship on the operation of the recipient's program."); 28 C.F.R. §41.53 (1988) (Department of Justice (DOJ) regulation promulgated pursuant to Section 504 providing that, in the context of employment, "[a] recipient shall make reasonable accommodations to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program").

[17] For example, 45 C.F.R. §84.12(c) (1989) (DHHS regulation) provides:

> In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include:
> (1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;
> (2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and
> (3) The nature and cost of the accommodation needed.

[18] *Southeastern Community College v. Davis*, 442 U.S. 397, 412, 99 S. Ct. 2361, 2370 (1979).

[19] 442 U.S. at 410, 99 S. Ct. at 2369. With respect to accessibility to non-educational programs, most regulations promulgated pursuant to Section 504 do not utilize the terms "undue hardship" or "fundamental alterations." Rather, the regulations presume that federally funded or assisted programs such as social security programs, health programs and elementary and secondary education programs must be made accessible to handicapped persons when viewed in their entirety. *See, e.g.*, the regulations discussed in note 9 of this chapter, *infra*. Like the DHHS and DOL regulations, the DOJ regulations dealing with program accessibility provide that a program "when viewed in its entirety, [must be] readily accessible to and usable by handicapped persons." [28 C.F.R. §39.150(a) (1989)]. The DOJ regulations, however, state that this accessibility requirement does *not* require an agency "to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens." [*Id.*] At least one commentator has strongly

A. Undue Hardship

The regulations include the size, type and budget of the employer's business and the nature and cost of the requisite accommodation as factors to be considered when deciding whether a particular accommodation for a handicapped person would constitute an undue hardship (at least in the employment context).[20] Courts are free, however, to allocate weight among these factors as they feel appropriate.[21] Thus, the courts have reached different conclusions when applying the litmus test of "undue hardship."

Of major concern is the question of the role that issues of cost should play in this analysis. While it is generally agreed that the term "undue hardship" denotes excessive costs, there is no consensus as to how to determine whether the cost of accommodations is excessive. The regulations clearly indicate that the focus is on the recipient's ability to bear the cost of the accommodation rather than on the amount of money at issue, *per se*. Thus, when looking to the recipient's ability to bear such costs some courts have compared the cost of the requisite accommodation to the overall budget of the recipient's business or program.[22] Where the cost of accommodation is relatively small in light of that overall budget, those courts have held that the cost does not constitute an undue hardship.[23] In the opinion of the authors, however, this test is unrealistic, since virtually *any* expenditure, except those made by very small businesses, could be found justifiable in relation to what would almost always be a significantly larger comparative expenditure. But the

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criticized the DOJ regulations. *See* T.M. Cook, "The Scope of the Right to Meaningful Access and the Defense of Undue Burdens Under Disability Civil Rights Laws," 20 *Loyola of Los Angeles Law Review* 471 (1988). Mr. Cook argues that the reasonable accommodation standards encompassing the theories of undue hardship and fundamental alterations utilized in the employment context should *not* apply in the context of federally funded or assisted social service programs.

[20] *See, e.g.*, note 17 of this chapter, *supra*.

[21] Appendix A to the DHHS regulation defining "undue hardship" (45 C.F.R. §84.12(c)) specifically provides that "[t]he weight given to each of these factors in determining undue hardship will vary depending on the facts of a particular situation. . . ." Appendix A — Analysis of Final Regulation, 45 C.F.R. Part 84 at 351 (1989).

[22] *See, e.g.*, *Nelson v. Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983) (comparing the cost of providing half-time readers for blind employees with the budget of the employer, the county Department of Public Welfare), *aff'd*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985); *Kohl v. Woodhaven Learning Center*, 672 F. Supp. 1226, 1246-47 (W.D. Mo. 1987) (comparing the cost to inoculate the staff of a learning center against hepatitis to accommodate a handicapped applicant with the overall budget of the center).

[23] In *Nelson v. Thornburgh* the court held that a yearly cost of approximately $6,000 for a reader for a blind employee of the Department of Public Welfare was reasonable when compared to the Department's $300,000,000 administrative budget. In *Kohl v. Woodhaven Learning Center* the court held that the $6,500 cost to inoculate the Center's staff to accommodate a handicapped applicant was reasonable when compared to the Center's $4 million yearly budget.

A somewhat different theory would be to compare the cost of accommodation to the amount of federal funds received by the recipient. *See, e.g.*, *Espino v. Besteiro*, 520 F. Supp. 905 (S.D. Tex. 1981) courts have not devised a logical alternative.[24] Some courts have merely stated that Section 504 does not require recipients of federal financial assistance to incur substantial additional expenditures to accommodate handicapped individuals.[25]

B. Fundamental Alteration and Substantial Modification

The various Section 504 regulations do not define the terms "fundamental alteration" or "substantial modification."[26] In the leading case on this issue, *Southeastern Community College v. Davis*,[27] the Supreme Court held that it would constitute a fundamental alteration to a nursing program to allow a hearing-impaired nursing student to attend only the academic courses, but not the clinical courses, offered by the nursing school.[28] The Court stated that "[w]hatever benefits [Ms. Davis] might realize from such a course of study, she would not receive even a rough equivalent of the training a nursing program normally gives."[29]

(comparing the cost of air conditioning a school classroom for a handicapped pupil to the federal funds received by the school district). While *Espino* was decided under the Education for All Handicapped Children Act, 20 U.S.C.A. §§1401-1485 (1990), rather than under Section 504, the same reasoning could be applied under Section 504.

[24] One commentator has suggested that, in the employment context, a comparison should be made between the cost of accommodation and the salary to be received by the handicapped employee. *See* Comment, "Employer Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness," 97 *Harvard Law Review* 997, 1003-09 (1984). *See also*, North Carolina Gen. Stats. Ann §§168A-3(10)(a)(6)(7) (1989) (reasonable accommodations do not include the provision of accommodations that would exceed 5 percent of a handicapped employee's yearly salary or annualized hourly wage). In the authors' opinion, this "formula" would contravene the essential purpose of Section 504, and could circumvent current regulatory provisions [*e.g.*, 45 C.F.R. §84.12(b)(2) (1989)] holding that reasonable accommodations include the provision of readers for blind persons and interpreters for deaf persons.

[25] *See, e.g., Duquette v. Dupuis*, 582 F. Supp. 1365 (D.N.H. 1984) (Section 504 did not require a state to amend its medical assistance program to provide medical treatment to *all* disabled persons, because that would require "major modifications" to the program as well as "substantial additional expenditures"); *Colin K. v. Schmidt*, 536 F. Supp. 1375, 1388 (D.R.I. 1982) ("in no case could a school system's failure to provide a private, residential placement [for a disabled child] constitute a violation of [Section 504]" because that section does not require " 'undue' financial or administrative burdens"), *aff'd*, 715 F.2d 1 (1st Cir. 1983). These cases rely on both the "undue hardship" and "substantial modification" tests in holding that no violation of Section 504 occurred.

[26] The two terms are used interchangeably. *See, e.g., Southeastern Community College v. Davis*, 442 U.S. at 413, 99 S. Ct. at 2370; *Alexander v. Choate*, 469 U.S. at 300, 105 S. Ct. at 720.

[27] 442 U.S. 397, 99 S. Ct. 2361 (1979).

[28] 442 U.S. at 409-10, 99 S. Ct. at 2369-69.

[29] 442 U.S. at 410, 99 S. Ct. at 2369.

In accord with this reasoning, numerous courts have held that Section 504 does not require recipients of federal financial assistance to place disabled individuals in new or less restrictive programs. For example, in *Sabo v. O'Bannon*[30] the court held that state and local officials did not violate Section 504 by placing a mentally disabled man in a state mental hospital rather than in a community living program. And, in *Pinkerton v. Moye*[31] the court held that a school board's decision not to establish a self-contained classroom for children with learning disabilities did not violate Section 504 since that would require substantial modification of the district's programs.[32] Similarly, in *Ciampa v. Massachusetts Rehabilitation Commission*[33] the court held that Section 504 did not require the Commission to take steps to provide services to a client who had repeatedly resisted such services, because the provision of services under those circumstances would require substantial program modification.

More recently, the Third and Fifth Circuits have analyzed the fundamental or substantial alteration issue by asking: will the required or necessary accommodation(s) violate the basic integrity of the job or program at issue? In *Copeland v. Philadelphia Police Department*[34] a police officer who was fired after it was discovered that he was a drug user maintained that his termination violated Section 504. The officer claimed that the police department should have been required to accommodate his drug addiction by placing him in a drug rehabilitation program, just as the department assigned police officers who were alcoholics or who were found to have violated state laws concerning alcohol abuse to a police department-operated alcohol rehabilitation program.[35] The Third Circuit, agreeing with the department's contention that "the very nature of the job requires that a police officer not engage in unlawful behavior because it is a police officer's duty to enforce the laws,"[36] held as follows:

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[30] 586 F. Supp. 1132 (E.D. Pa. 1984).

[31] 509 F. Supp. 107 (W.D. Va. 1981), 1982-83 EHLR 554:291, 295.

[32] *See also, Manecke v. School Board of Pinellas County,* 553 F. Supp. 787, 790 n.4 (M.D. Fla. 1982), 1982-83 EHLR 554:338, 339 n.4 (allegation that officials refused to place a mentally retarded individual in a residential, non-institutional facility did not constitute a valid claim under Section 504), *aff'd in part and rev'd in part on other grounds,* 762 F.2d 912 (11th Cir. 1985), 1984-85 EHLR 556:463, *cert. denied,* 474 U.S. 1062 (1986); *Garrity v. Gallen,* 522 F. Supp. 171, 213 (D.N.H. 1981) (Section 504 does not require provision of community placements for all mentally retarded citizens; that Section does, however, require an *individualized* determination of discrimination).

[33] 718 F.2d 1 (1st Cir. 1983).

[34] 840 F.2d 1139 (3d Cir. 1988), *cert. denied,* 109 S. Ct. 1636 (1989).

[35] As previously stated in chapter 4 of this text, where employment is at issue alcoholics and drug addicts are only protected under Section 504 if their current alcohol or drug use does not prevent them from performing the job in question or does not constitute a direct threat to the property or safety of others.

[36] 840 F.2d at 1149.

> We conclude that accommodating a drug user within the ranks of the police department would constitute a "substantial modification" of the essential functions of the police department and would cast doubt upon the integrity of the police force. No rehabilitation program can alter the fact that a police officer violates the laws he is sworn to enforce by the very act of using illegal drugs.[37]

In *Brennan v. Stewart*[38] a blind applicant sought to require a Texas state board to modify its licensing requirements for persons seeking to obtain a license to fit and dispense hearing aids. The licensing regulations at issue required holders of temporary permits to personally complete 15 hours of " 'ear mold impressions and otoscopic examinations of the ear.' "[39] Mr. Brennan's application for a temporary permit was denied by the Licensing Board because his blindness would prevent him from personally conducting otoscopic examinations.[40] In remanding the case to the district court to hear Mr. Brennan's Section 504 claims, the Fifth Circuit noted that the Licensing Board's regulations were reasonable in themselves, since "candidates who can visually inspect the client's ear will obtain a good deal more useful information about it and will be able to provide better care to the patient in the process of fitting a hearing aid."[41] Thus, the circuit court held that upon remand the burden would be with Mr. Brennan "to demonstrate to the [district] court some reasonable accommodation in these requirements which meets his special needs without sacrificing the integrity of the Board's licensing program."[42]

A crucial question when considering whether accommodating a disabled individual would require fundamental alteration of the job or program at issue lies in the determination of how much deference should be given to the recipient's findings on this question. One court has held that *Davis* supports "reasonable deference to the decisions made by administrators of federally funded programs so long as no evidence is presented of discriminatory intent with regard to the handicapped person."[43] These courts, in effect, have held that a rational or reasonable basis for an administrator's or employer's decision is sufficient for upholding that decision.[44] Other courts, however, have rejected this "reasonable" or "rational basis" test in Section 504 actions. In *Pushkin v. Regents of the University of Colorado*[45] the Tenth Circuit stated that: "[Section 504] provides that a recipient of federal financial assistance may not discriminate on the basis of handicap, regardless of whether there is a rational basis for so discriminating. . . . The mere fact that [a recipient] acted in a rational manner is no defense to an act of discrimination."[46] And, in *Strathie v. Department of Transportation*[47] the Third Circuit held that "broad judicial deference [to program administrators] resembling that associated with the 'rational basis' test would substantially undermine Congress' intent in enacting [S]ection 504 that stereotypes or generalizations not deny handicapped individuals equal access to federally-funded programs."[48]

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[37] *Id.*

[38] 834 F.2d 1248 (5th Cir. 1988).

[39] 834 F.2d at 1250.

[40] *Id.*

[41] 834 F.2d at 1259.

[42] 834 F.2d at 1262. *See also, Franklin v. U.S. Postal Service*, 46 Fair Empl. Prac. Cas. (BNA) 1734, 1738 (D. Ohio 1988) ("An employer who twice restores an employee to her job after incidents of violence against public officials has made reasonable accommodations to that employee").

Numerous cases discussing the issue of reasonable accommodations are found in situations involving access to transportation. Those cases are discussed in chapter 10 of this text, *infra.*

[43] *Doe v. Region 13 Mental Health-Mental Retardation Commission*, 704 F.2d 1402, 1410 (5th Cir. 1983).

The rationale followed by courts granting reasonable deference to the decisions of employers or administrators in the absence of discriminatory intent was implicitly overruled by the Supreme Court's conclusion in *Alexander v. Choate* that Section 504 prohibits some actions that have a discriminatory effect on handicapped persons even in the absence of discriminatory intent.[49] After *Alexander v. Choate* the rationale of the *Pushkin* and *Strathie* courts should prevail, since that is the only rationale that is consistent with the Supreme Court's implicit decision.[50]

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[44] Thus, in *Doe v. Region 13 Mental Health-Mental Retardation Commission*, the Fifth Circuit held that a mental health center did not violate Section 504 by firing a mental health associate who had been a superior employee for over a year based on the suppositions that the therapist had "suicidal tendencies" and that a therapist's suicide might have detrimental effects on her patients.

[45] 658 F.2d 1372 (10th Cir. 1981).

[46] 658 F.2d at 1383.

[47] 716 F.2d 227 (3d Cir. 1983).

[48] 716 F.2d at 231 (footnote omitted).

[49] 469 U.S. at 299, 105 S. Ct. at 719 ("we assume without deciding that Section 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped"). *See* chapter 6 of this text, *infra*.

[50] The Fifth Circuit apparently recognized that fact in *Brennan v. Stewart*, when it acknowledged that under its "reasonable deference" standard enumerated in *Doe v. Region 13 Mental Health-Mental Retardation Commission (see* note 44 of this chapter, *supra*), Mr. Brennan's case would be over, because the Licensing Board's regulation requiring hearing-aid dispensers to personally conduct otoscopic examinations was clearly reasonable. [834 F.2d at 1261. *See* text at notes 39-41 of this text, *supra*.] After *Alexander v. Choate*, however, the Fifth Circuit held that the "reasonable accommodation" issue could not be decided in such a cursory fashion [834 F.2d at 1261-62].

III. Otherwise Qualified

Once it has been determined that a particular accommodation for a handicapped person is reasonable within the meaning of Section 504, in that it does not constitute an undue hardship to the recipient and does not require a fundamental alteration in the nature of the recipient's program, the question to resolve is whether, after provision of the accommodation, the handicapped person is otherwise qualified for the job or program at issue. In the employment context, an otherwise qualified handicapped individual is defined as one who, with or without reasonable accommodations, can perform the "essential functions" of the job in question.[51] In the context of postsecondary education, an otherwise qualified handicapped individual is defined as one who meets the "academic and technical standards" of the program.[52] With respect to other services and programs, an otherwise qualified handicapped individual is defined as one who meets the "essential eligibility requirements" of the program.[53]

Generally, where it is shown that a handicapped individual can perform the essential functions of the job or program at issue with the provision of reasonable accommodations (accommodations that would neither place an undue burden on the program nor require modification of the essential nature of the program), courts have held handicapped persons to be otherwise qualified. By way of illustration, in *DeLong v. Brumbaugh*[54] the court held that a deaf woman was otherwise qualified to serve as a juror when provided with a sign-language interpreter to reasonably accommodate her deafness.[55]

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[51] *See, e.g.*, 45 C.F.R. §84.3(k)(1) (1989) (DHHS regulation); 29 C.F.R. §32.3 (1989) (DOL regulation); 34 C.F.R. §104.3(k)(1) (1989) (DOE regulation). As the Supreme Court stated in *School Board of Nassau County v. Arline*:

> In the employment context, an otherwise qualified person is one who can perform the "essential functions" of the job in question. When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any "reasonable accommodation" by the employer would enable the handicapped person to perform those functions.

480 U.S. 273, 288 n.17, 107 S. Ct. 1123, 1131 n.17 (1987), 1986-87 EHLR 558:228, n.17.

[52] *See, e.g.*, 45 C.F.R. §84.3(k)(3) (1989) (DHHS regulation); 34 C.F.R. §104.3(k)(3) (1989) (DOL regulation).

[53] *See, e.g.*, 28 C.F.R. §39.103 (1989) (DOJ regulation); 34 C.F.R. §104.3(k)(4) (1989) (DOE regulation); 29 C.F.R. §32.3 (1989) (DOL regulation); 45 C.F.R. §84.3(k)(4) (1989) (DHHS regulation). For the definition of an otherwise qualified handicapped person with respect to public preschool, elementary, secondary or adult educational services, *see, e.g.*, 45 C.F.R. §84.3(k)(2) (1989) (DHHS regulation); 34 C.F.R. §104.3(k)(2) (1989) (DOE regulation).

[54] 703 F. Supp. 399 (W.D. Pa. 1989).

[55] The court noted that the evidence showed that the presence of an interpreter would "neither disrupt nor delay the judicial process in any respect." 703 F. Supp. at 404. The court concluded that

Mere stereotypical beliefs about purported inabilities or inadequacies stemming from a particular handicap are not sufficient grounds for holding a handicapped person not otherwise qualified. Thus, in *Pushkin v. Regents of the University of Colorado*[56] a medical doctor alleged that a university wrongfully denied him admittance to the Psychiatric Residency Program because he suffered from multiple sclerosis, which confined him to a wheelchair and limited his abilities to walk and write. The university's admissions committee argued that persons with multiple sclerosis have difficulty withstanding stress, and that patients would not be comfortable talking to a doctor or counselor who suffered from multiple sclerosis. Dr. Pushkin's long-time counselor, however, testified that the committee's concerns were unfounded with respect to Dr. Pushkin. The trial court refused to allow the university to discriminate based on stereotypical beliefs about a handicapping condition that were not proven to be true-in-fact with respect to the particular plaintiff, and the Tenth Circuit affirmed. Both courts found the defendant otherwise qualified for the residency program.

Conversely, of course, in some situations accommodations may not suffice to render a handicapped individual otherwise qualified for a job or program. In *Franklin v. United States Postal Service*,[57] for example, the court held that a paranoid schizophrenic who refused to take the required medication to control her illness was not otherwise qualified to work at the post office. Because the Postal Service had twice reinstated the plaintiff in her job after she had engaged in violent episodes, the court held that any further accommodations would be unreasonable.

The major confusion with respect to the "otherwise qualified" issue lies in determining whether a handicapped person can perform the essential functions of a job or meets the essential requirements of a program. Several factors are at issue in this analysis:

A. Essential Functions

The determination of what constitutes the essential functions of a job or program is highly fact specific. Thus, at least one court has held that mere reliance on job criteria set forth in a job description is not sufficient for purposes of this factfinding analysis. In *Hall v. United States Postal Service*[58] a Postal Service employee who incurred an on-the-job injury to her hip, foot and back was denied a position as a distribution clerk. The Postal Service argued that the job description, which

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requiring the court to provide an interpreter for a deaf juror would not place an undue burden on the state or the court nor require modification of the essential nature of the program. 703 F. Supp. at 405.

[56] 658 F.2d 1372 (10th Cir. 1981).

[57] 46 Fair Empl. Prac. Cas. (BNA) 1734 (S.D. Ohio 1988).

[58] 857 F.2d 1073 (6th Cir. 1988). Although this case was filed under both Sections 504 and 501 [*see* chapter 9 of this text, *infra*], the "essential function" analysis is the same for purposes of both statutes.

required "lifting up to 70 pounds, kneeling and repeated bending,"[59] included tasks that the plaintiff was unable to perform. The plaintiff alleged that the job description was inaccurate since the actual job did not require such lifting and bending. The court held that a determination of whether physical qualifications are essential functions of a job "should be based upon more than statements in a job description and should reflect the actual functioning and circumstances of the particular enterprise involved."[60] Further, the court held that an affidavit filed by the Employment and Placement Supervisor of the Postal Service stating that "heavy lifting [is] an essential part of the job, as it is done repetitively every day," did not eliminate a genuine factual dispute as to this issue.[61] The court noted that the supervisor's "assessment of what is 'essential' may differ from a court's conclusion after it has conducted the [necessary] 'individualized inquiry. . . .' "[62]

A few courts have held that the amount of time to be expended on a particular job function does not, in and of itself, serve as evidence of essentiality or lack thereof. In *Koffler v. Hahnemann University*[63] a university professor claimed that the essential functions of his position constituted teaching and research supervision, both tasks that he was physically capable of performing. Dr. Koffler conceded that his disability rendered him unable to be present on the campus on a regular basis, but contended that his continuous presence on the campus was not an essential function of the job of a university professor. Dr. Koffler explained that notwithstanding his disability he was able to engage in 90 percent of the research activities he had previously engaged in. He sought to require the university to "reasonably" accommodate him by redefining his job duties to eliminate the 10 percent of duties he was unable to perform. When granting summary judgment in favor of the university the court stated:

> The essential nature of a particular job function is not determined solely by the amount of time devoted to it. Performance of a job function only occasionally does not make that job function any less essential or make it unrelated to the job. . . . Nor was it up to Dr. Koffler to unilaterally decide what the essential duties of this job are and how he should go about performing them.[64]

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[59] 857 F.2d at 1075.

[60] 857 F.2d at 1079.

[61] *Id.*

[62] *Id. See also, Trimble v. Carlin*, 633 F. Supp. 367 (E.D. Pa. 1986) (the mere fact that a disabled post office employee was unable to lift 70 pounds was not dispositive evidence that the employee was not otherwise qualified for the job at issue; the post office must consider whether reasonable accommodations would enable him to fulfill the lifting functions—moreover there were many other essential functions of the job that the employee *could* perform).

[63] No. 85-5189, slip op. (E.D. Pa., July 10, 1986) (available on Lexis genfed library).

[64] *Id. But see, Ackerman v. Western Electric Co.*, 643 F. Supp. 836 (N.D. Cal. 1988) (holding that under the California Fair Employment and Housing Act, which contains a similar requirement that an

The court concluded that Section 504 does not require an employer "to adopt an entirely different standard of attendance for a handicapped person. . . ."[65]

In some cases the courts have easily resolved the essential functions question. In *Guerriero v. Schultz*,[66] for example, the court held that a foreign service officer, whose self-acknowledged need for continuing therapy in the United States prohibited him from working abroad, could not perform the essential functions of a foreign service officer.[67] And, in *Wallace v. Veterans Administration*[68] a registered nurse was a recovering drug abuser whose doctor advised that she be restricted in access to injectable narcotics for 12 to 18 months. In denying her a position in the intensive care unit of a veterans hospital, the hospital argued that the plaintiff was not otherwise qualified because she could not administer narcotics to patients. The court held that the ability to administer narcotics was not an essential function of the job. The court found that less than 2 percent of a nurse's time is spent administering narcotics, and that accommodations such as job sharing or controlled patient assignment could enable the plaintiff to perform as a nurse.

Courts have a great deal of leeway in resolving factual disputes concerning this issue, however. An illustrative case is *Simon v. St. Louis County*.[69] In that case a former police officer became a paraplegic as the result of a gunshot wound sustained in the line of duty. The police department refused to allow Simon to return to work because he could not fulfill the department's requirements that all officers be able to effect a forcible arrest and to transfer among all positions. Simon

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employee be able to perform the essential functions of a job, that reassignment of a function that took no more than 12 percent of an employee's time would not require the employer to eliminate essential functions of the plaintiff's job), *aff'd*, 860 F.2d 1514 (9th Cir. 1988).

[65] *Id. See also*, *Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983). In that case an individual who suffered from a heart condition was held to be not otherwise qualified for a position as a park technician. The plaintiff contended that he could perform the essential functions of the job, since the majority of a park technician's duties involve the collection of fees and 90 percent of the time on the job is spent travelling (by vehicle) from campsite to campsite. Testimony evidenced, however, that the plaintiff could not safely operate a motorboat alone, walk over rough terrain or handle disorderly park visitors, although park technicians are sometimes called upon to perform those functions. The court agreed with the defendant's position that the essential functions of a job are not determined *solely* by the amount of time devoted to those functions. The court held that, due to limited manpower, it would constitute an undue hardship for the defendant to require other park technicians to perform the duties that the plaintiff was unable to perform.

[66] 557 F. Supp. 511 (D.D.C. 1983).

[67] *See also*, *Lutter v. Fowler*, 41 Fair Empl. Prac. Cas. (BNA) 1227 (D.D.C. 1986) (partially blind individual was not otherwise qualified because he could not perform the essential functions of the job at issue. Despite the fact that the agency provided the plaintiff with secretary-readers and offered to provide him with tape recorders, the plaintiff did not complete his assignments in a timely fashion), *aff'd*, 808 F.2d 137 (D.C. Cir. 1986).

[68] 683 F. Supp. 758 (D. Kan. 1988).

[69] 735 F.2d 1082 (8th Cir. 1984).

argued that those were not legitimate job criteria, since they were neither necessary to the job nor required of all officers. The essence of Simon's argument, therefore, while not expressly stated as such, was that the ability to make a forceful arrest and the ability to transfer among all positions in the police department were not essential functions for *all* police officer jobs. The Eighth Circuit held that, to satisfy Section 504, a job requirement must be a "legitimate physical requirement of the defendant's program" and must be uniformly applied.[70] The Eighth Circuit noted that there was substantial evidence in the record showing that the job requirements at issue were neither necessary nor required of all officers. Thus, the Eighth Circuit remanded the case to the district court to determine whether the ability to make forcible arrests and the capacity to be freely transferred to all positions in the police department were necessary and legitimate requirements of the job and were uniformly applied. Despite evidence showing that the St. Louis police department had at least two police officers who could not make a forcible arrest, that other police departments had physically impaired officers who could not make forcible arrests, and that the transfer policy was not applied to 4 percent of the St. Louis police officers, the district court held that the "legitimacy and uniformity of job requirements" test had been satisfied.[71] The Eighth Circuit affirmed, holding that "[i]t is not our function to reevaluate the evidence and to substitute our judgment for the district court's."[72]

B. Safety

Another relevant factor in the otherwise qualified analysis involves safety. A handicapped individual who is unable to perform the essential functions of a job or program without creating a substantial risk of injury to himself or others is held not to be otherwise qualified for the job or program.[73] This safety defense to the otherwise qualified issue may arise in several contexts. The defense is sometimes raised in the context of an allegation that a handicapped individual cannot perform the essential functions of the job or program because such performance would be unsafe for *that handicapped person*. The defense is also raised in the context of an allegation that a handicapped person cannot perform the essential functions of the job or program because such performance would constitute a threat to the health or safety of *others*. A subcategory of the defense in the latter context involves the allegation that an individual with a contagious disease is not otherwise qualified because of the risk that he or she will transmit the disease to others.

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[70] 656 F.2d 316, 320 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982).

[71] 563 F. Supp. 76 (E.D. Mo. 1983), *aff'd*, 735 F.2d 1082 (8th Cir. 1984).

[72] 735 F.2d 1082, 1085 (8th Cir. 1984).

[73] This safety defense may have originated in *Southeastern Community College v. Davis*, where the Supreme Court held that Ms. Davis's hearing loss "actually prevents her from safely performing in both her training program and proposed profession . . . [and that] otherwise qualified can only be read to mean otherwise able to function sufficiently . . ." 442 U.S. at 403, 99 S. Ct. at 2365-66. The Court in *Davis* appeared to equate "sufficient performance" of the program with "safe performance" of the program.

Some of the regulations promulgated pursuant to Section 504 mention this "safety" defense. *See, e.g.*, 29 C.F.R. §32.14(a) (1989) (the DOL regulation providing that "[t]he recipient shall provide for, and shall adhere to, a schedule for the review of the appropriateness of all job qualifications to ensure that to the extent job qualifications tend to exclude handicapped individuals because of their handicap, they are related to the performance of the job and are consistent with business necessity and *safe performance*") (emphasis added).

1. Safety in General

Some courts have not separated the issues of harm to the handicapped individual versus harm to others, but have applied a general safety defense to the Section 504 otherwise qualified issue. In *Davis v. Meese*,[74] for example, the court held that the United States Federal Bureau of Investigation (FBI) did not violate Section 504 when it prohibited all insulin-dependent diabetics from being employed as special agents and investigators. The court concluded that the FBI had a legitimate safety defense because no medically valid test exists to determine reliably whether insulin-dependent diabetics might be subject to "a severe hypoglycemic occurrence while on an assignment in a situation where such an occurrence could pose a serious risk of damage or harm to co-workers, the public or the individual. . . ."[75] And, in *Commonwealth of Pennsylvania, Department of Transportation, Bureau of Traffic Safety v. Liberati*[76] the court held that the refusal to grant a driver's license to a plaintiff who required bioptic eyeglasses to drive did not violate Section 504 because the plaintiff was not otherwise qualified to receive a license. The court's ruling was premised on the fact that bioptic lenses "create a relatively large scotoma or 'blind spot' around the central field of vision during their use . . . [which] renders the device unsafe for use while driving."[77]

Other courts have addressed the safety issue only in the context of the safety of the handicapped individual. Thus, in *Local 1812, American Federation of*

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[74] 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd without op.*, 865 F.2d 592 (3d Cir. 1989).

[75] 692 F. Supp. at 518.

[76] 472 A.2d 741 (Commw. Ct. Pa. 1984).

[77] 472 A.2d at 744. *See also*, *Anderson v. U.S. Air, Inc.*, 619 F. Supp. 1191 (D.D.C. 1985), *aff'd*, 818 F.2d 49 (1987) (prohibiting seating of blind persons next to emergency airplane exits did not violate Section 504; safety concerns rendered blind persons not otherwise qualified to sit in those seats); *Sharon v. Larson*, 650 F. Supp. 1396 (E.D. Pa. 1986) (individual who required bioptic eyeglasses not otherwise qualified to obtain a driver's license); *Doe v. New York University*, 666 F.2d 761 (2d Cir. 1981) (upholding a medical school's decision to reject a student with a history of mental illness and self-destructive behavior based on the reasoning that the student might constitute a threat to the safety of herself and others).

Government Employees v. United States Department of State[78] the court considered a Section 504 challenge to a rule promulgated by the Department of State requiring foreign service employees to undergo mandatory AIDS testing. The court granted a preliminary injunction in favor of the Department on plaintiff's Section 504 claim for the reason that "it does not appear . . . that [AIDS]-infected persons are 'otherwise qualified' for worldwide Foreign Service duty" because such individuals would suffer through greater risk of infection or less competent medical care in other countries.[79]

Still other courts have addressed the safety issue only in the context of the safety of others. In *Strathie v. Department of Transportation*[80] for example, the court rejected the Department of Transportation's claim that to allow a hearing-impaired person to serve as a school bus driver would constitute an undue safety risk to others.[81]

Regardless of the context of the safety defense, courts have recognized that to raise such a defense successfully, record evidence must illustrate that performance by the particular plaintiff would in fact constitute a safety hazard. By way of example, in *Carter v. Casa Central*[82] a nursing home claimed that the plaintiff was not otherwise qualified to serve as Director of Nursing because her multiple sclerosis might prevent her from standing on her feet for long periods of time. The nursing home claimed that the plaintiff posed a significant risk of harm to herself or to others. The court noted, however, that "[t]he record is bereft of any evidence that Carter's handicap posed *any* risk of harm to anyone, much less a significant risk. It is precisely this type of uninformed generalization based upon stereotypes and prejudices which [Section 504] is designed to counteract."[83] The court held,

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[78] 662 F. Supp. 50 (D.D.C. 1987).

[79] *Id. See also*, ***Kampmeier v. Nyquist***, 553 F.2d 296 (2d Cir. 1977) (upholding a school district's refusal to permit one-eyed students to participate in contact sports due to the risk of injury to the children's remaining eyes); ***Poole v. South Plainfield Board of Education***, 490 F. Supp. 948 (D.N.J. 1980) (school district could not prohibit a high school student with only one kidney from participating on the wrestling team despite the risk of injury to the student's other kidney); ***Bentivegna v. U.S. Department of Labor***, 694 F.2d 619, 622 (9th Cir. 1982) (city could not prohibit a diabetic from working as a building repairer due to "concern for Mr. Bentivegna's personal health and safety as a result of potential injury").

[80] 716 F.2d 227 (3d Cir. 1983).

[81] *See also*, ***Wallace v. Veterans Administration***, 683 F. Supp. 758 (D. Kan. 1988) (a registered nurse who was precluded from administering narcotics to patients due to a past drug addiction did not constitute a safety risk to others); ***Chalk v. United States District Court***, 840 F. 2d 701 (9th Cir. 1988) (reversing the district court's denial of a preliminary injunction to reinstate a teacher with AIDS because the court improperly requested the teacher to disprove every theoretical possibility of harm to others).

[82] 849 F.2d 1048 (7th Cir. 1988).

[83] 849 F.2d at 1054-55.

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therefore, that the plaintiff was an otherwise qualified handicapped individual within the meaning of Section 504. Similarly, in *Smith v. Administrator of Veterans Affairs*[84] an employer claimed that an epileptic plaintiff was not otherwise qualified to be a nursing assistant because the plaintiff's history of seizure disorders constituted a hazard to herself and others. Because the employer merely relied on stereotypical generalizations about epileptics, but did not present evidence showing that the particular plaintiff was likely to cause injury to herself or others, the court found no legitimate safety defense.[85]

Some commentators and courts have taken the position that where the safety defense enumerated by the employer or program administrator concerns the safety of the handicapped plaintiff, rather than the safety of others, such defenses should be narrowly defined.[86] In *Poole v. South Plainfield Board of Education*[87] the court stated that "[t]he purpose of Section 504 . . . is to permit handicapped individuals to live life as fully as they are able, without paternalistic authorities deciding that certain activities are too risky for them."[88] And, in *Pushkin v. Regents of the University of Colorado*[89] the Tenth Circuit noted that discrimination against handicapped people ". . . often occurs under the guise of extending a helping hand or a mistaken or restrictive belief as to the limitations of handicapped persons."[90] Thus, in *Bentivegna v. United States Department of Labor*[91] the Ninth Circuit held that such safety defenses must be examined with "rigorous scrutiny"[92] to determine whether the denial of a job to a handicapped person for safety reasons is related to "business necessity."[93] The Ninth Circuit held that "[a]ny qualification based on the risk of future injury [to a handicapped person] must be examined with special care if [Section 504] is not to be circumvented easily, since almost all handicapped persons are at a greater risk from work-related injuries."[94]

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[84] 32 Fair Empl. Prac. Cas. (BNA) 986 (C.D. Cal. 1983).

[85] Further, in response to the employer's purported concern that the plaintiff might fail to take his medication, the court stated that the employer, a VA hospital, could reasonably accommodate the plaintiff by performing simple blood tests to determine the plaintiff's medication level.

[86] *See generally*, B. Tucker, "Section 504 of the Rehabilitation Act After Ten Years of Enforcement: The Past and the Future," 1989 *University of Illinois Law Review* (Issue 4, June 1990).

[87] 490 F. Supp. 948 (D.N.J. 1980).

[88] 490 F. Supp. at 953.

[89] 658 F.2d 1372 (10th Cir. 1981).

[90] 658 F.2d at 1385.

[91] 694 F.2d 619 (9th Cir. 1982).

[92] 694 F.2d at 621.

[93] 694 F.2d at 622.

[94] *Id.*

Where the health or safety of others is at issue, however, some courts have attempted to apply standards that would recognize the legitimate concerns of employers or program administrators while at the same time avoid discrimination against disabled people. In *Strathie v. Department of Transportation*[95] the Third Circuit rejected the department's contention that employment criteria were legitimate if they fostered the goal of eliminating all possible safety risks. The court held that employment criteria could seek only to prevent "appreciable risks," rather than "all possible risks," to the health and safety of others. Moreover, to uphold the recipient's safety defense, the requisite "appreciable risks" must be factually proven and not based upon conjecture or stereotypical attitudes about handicapped people.[96] To the converse, in *Doe v. New York University*[97] the Second Circuit rejected the plaintiff's contention that she should be considered otherwise qualified for readmission to medical school if it appeared "more likely than not" that she could complete her medical training and serve as a doctor without recurrence of the mental illness from which she had previously suffered.[98] Rather, the court held that while a "significant risk of harm" must be shown to render a handicapped individual not otherwise qualified for a program or position, "any appreciable risk," even a "minimal risk," would satisfy the "significant risk of harm" test.[99]

2. Safety in the Context of Communicable Diseases

The Supreme Court has opined that an otherwise qualified test addressing the issue of the safety of others must allow Section 504 "to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks."[100] The Court held in *School Board of Nassau County v. Arline* that, when considering the issue of whether a handicapped person with a contagious disease is otherwise qualified for a job or program, courts must conduct a factual inquiry which should include:

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[95] 716 F.2d 227 (3d Cir. 1983).

[96] In *Strathie* a Department of Transportation regulation provided that in order to obtain a school bus driver's license an applicant must have a stated level of hearing proficiency without the assistance of a hearing aid. Strathie, whose hearing met the required standard *with* the assistance of a hearing aid, protested that the regulation was discriminatory. The district court held that the licensing requirement did not violate Section 504. The Third Circuit reversed.

[97] 666 F.2d 761 (2d Cir. 1981).

[98] 666 F.2d at 777.

[99] 666 F.2d at 777, 780.

[100] *School Board of Nassau County v. Arline*, 480 U.S. 273, 287, 107 S. Ct. 1123, 1131 (1987), 1986-87 EHLR 558:228.

> [findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.[101]

Several courts have applied this test when determining whether plaintiffs with AIDS or ARC were otherwise qualified for a job or program. In *Doe v. Dolton Elementary School District No. 148*[102] the court granted a preliminary injunction requiring a school district to allow a child with AIDS to attend school. The court held that a student with AIDS is "otherwise qualified unless he poses a significant risk of infecting teachers and fellow students."[103] Applying the four-pronged test set forth in *Arline*, the court found "no significant risk of transmission of AIDS in the classroom setting."[104] And, in *Chalk v. United States District Court*[105] the Ninth Circuit reversed a district court's denial of a motion by a schoolteacher with AIDS to reinstate him to classroom duties. The district court had refused to allow the teacher to resume teaching duties because "the problem is that we simply do not know enough about AIDS to be *completely certain* [that there is little or no risk of transmission in a classroom setting]."[106] The Ninth Circuit held that the district court had improperly failed to follow the legal standards set forth by the Supreme Court in *Arline*. The Ninth Circuit stated that "[l]ittle in science can be proved with complete certainty, and [S]ection 504 does not require such a test."[107] The appellate court held that since there was no *significant* risk that the teacher would transmit AIDS to others, it was likely that the teacher would prevail on the merits of his claim to be otherwise qualified to teach. Thus the appellate court ordered the district court to grant a preliminary injunction requiring the school district to allow the plaintiff to teach.[108]

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[101] 480 U.S. at 288, 107 S. Ct. at 1131, 1986-87 EHLR at 558:228. (citing Brief for American Medical Association as *Amicus Curiae* at 19).

[102] 694 F. Supp. 440 (N.D. Ill. 1988).

[103] 694 F. Supp. at 445.

[104] *Id.*

[105] 840 F.2d 701 (9th Cir. 1988).

[106] 840 F.2d at 707 (emphasis added).

[107] *Id.*

[108] *See also, Thomas v. Atascadero Unified School District*, 662 F. Supp. 376, 380 (C.D. Cal. 1987) (granting a preliminary injunction prohibiting a school district from excluding a child with AIDS from the classroom despite the fact that the child had bitten another student; the court stated "[t]he overwhelming weight of medical evidence is that the AIDS virus is not transmitted by human bites . . ."); *Ray v. School District of DeSoto County*, 666 F. Supp. 1524 (M.D. Fla. 1987) (granting a preliminary injunction prohibiting a school district from excluding three brothers who tested positive

A different result was reached in *Harris v. Thigpen*,[109] however. In that case prison inmates were required to be tested for AIDS and those inmates who tested positive were segregated in the prison system. The court found that: (1) AIDS could be transmitted in the prison environment through homosexual activity (forced or voluntary), intravenous drug use, tattooing and the exchange of blood resulting from fights; (2) the duration of the risk of contracting AIDS is perpetual; (3) the severity of the risk is great since the potential harm to third parties is death; and (4) the probability of the transmission of AIDS in the prison setting is significant. Accordingly, the court held that prisoners who tested positive for AIDS were not otherwise qualified, and no reasonable accommodation could be provided to render such prisoners otherwise qualified, to live in the general prison population.

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for AIDS from the classroom); *Kohl v. Woodhaven Learning Center*, 672 F. Supp. 1226 (W.D. Mo. 1987) (mentally retarded, blind plaintiff who was an active carrier of the hepatitis B virus held otherwise qualified for admission to a life skills and vocational center despite the fact that the plaintiff exhibited behavioral problems including biting and scratching; the court held that the defendant could reasonably accommodate the plaintiff by inoculating all staff who would have direct contact with the plaintiff).

For a case decided prior to the Supreme Court's ruling in *Arline*, *see New York State Association for Retarded Children v. Carey*, 612 F.2d 644 (2d Cir. 1979). In that case the Second Circuit affirmed the district court's ruling that the New York City Board of Education's policy of segregating carriers of hepatitis B in the educational setting violated Section 504. The appellate court stated:

> [T]he Board was unable to demonstrate that the health hazard posed by the hepatitis B carrier children was anything more than a remote possibility. There has never been any definite proof that the disease can be communicated by non-parenteral routes such as saliva. Even assuming there were, the activities that occur in classroom settings were not shown to pose any significant risk that the disease would be transmitted from one child to another.

612 F.2d at 650.

[109] 727 F. Supp. 1564 (M.D. Ala. 1990).

6

Section 504: Discrimination Solely on the Basis of Handicap and Special Issues Relating to Education and Employment

I. Discrimination Solely on the Basis of Handicap

Section 504 prohibits only such discrimination against otherwise qualified individuals that is "solely on the basis of handicap."[1] Unlike situations involving Titles VI[2] and VII,[3] in which employers and program administrators are not allowed to consider an applicant's race or sex in *any* fashion, Section 504 does not prohibit employers or program administrators from considering an applicant's handicap. Indeed, consideration of the handicap is often necessary. Race and sex are considered impermissible factors when determining whether an individual is qualified for a job or program because those factors virtually never tell anything about a person's ability to perform. An individual's handicap, however, will frequently bear some relationship to his ability to perform in a job or program, since many handicapped people suffer some impairment of function. Thus, employers and program administrators do not violate Section 504 by considering an applicant's handicap as a relevant criterion. Rather, to violate Section 504 an employer or program administrator must have no *legitimate* reason for rejecting a handicapped individual; the *sole* reason for that rejection must be an unfounded or unjustifiable response to the handicap.[4]

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[1] 29 U.S.C.A. §794 (West Supp. 1990).

[2] 42 U.S.C.A. §§2000d - 2000d-5 (1981 and West Supp. 1990) (prohibiting discrimination on the basis of race).

[3] 42 U.S.C.A. §§2000e-2 - 2000e-17 (1981) (prohibiting discrimination on the basis of sex).

[4] *See, e.g., Norcross v. Sneed,* 755 F.2d 113 (8th Cir. 1985) (noting that in a Section 504 action a plaintiff must show that the handicap was the sole reason for the action at issue, while under Title

Examples of instances in which an individual would be discriminated against solely on the basis of handicap include situations in which: (1) an employer or program administrator denies a handicapped person access to jobs or services because other people (such as customers or co-workers) would feel uncomfortable around the handicapped person;[5] (2) an employer or program administrator erroneously concludes that an individual's handicap would prevent him or her from performing competently in the program or job at issue;[6] and (3) an employer or program administrator fails to provide reasonable accommodations for a handicapped individual.[7] An example of an instance in which an individual would not be discriminated against solely on the basis of handicap involves a situation in which an employer or program administrator makes a decision that is premised on handicap-neutral factors, such as the individual's legitimate lack of qualifications for the job or program or the fact that better qualified applicants are available.[8]

A more difficult situation arises when a handicapped individual is denied employment, advancement in employment, or admission to programs or services based on two factors: one related to the handicap and one not related to the handicap. An example of such a situation would involve a case in which a blind individual was denied admission to college because the admissions committee erroneously believed that blind people are incapable of performing well in

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VII a plaintiff claiming to have been intentionally discriminated against on the basis of sex need only show that her sex was a factor influencing the decision); *Gardner v. Evans*, 719 P.2d 1185 (Idaho 1986) (a blind plaintiff did not satisfy the Section 504 requirement that she show she was discriminated against *solely* on the basis of handicap by merely showing that after firing the blind person from her job the employer hired a sighted person for the job), *cert. denied*, 479 U.S. 1007 (1986); *Sullivan v. Pittsburgh*, 811 F.2d 171 (3d Cir. 1987) (a city that closed alcohol treatment centers because of community hostility toward the placement of alcoholics in neighborhoods throughout the city discriminated against alcoholics solely on the basis of their handicap in violation of Section 504), *cert. denied*, 484 U.S. 849 (1987).

One court has held that the mere fact that an employer stated to a handicapped employee when firing that employee that "[y]ou are going to have difficulty in getting a job because of your handicap" did not, in and of itself, constitute evidence that the plaintiff was discriminated against solely on the basis of handicap. *Holly v. Naperville*, 603 F. Supp. 220, 229 (N.D. Ill. 1985). In that case, however, the plaintiff had admitted throughout his deposition that "his handicap played no part in any actions taken against him." *Id.*

[5] *See, e.g., School Board of Nassau County v. Arline*, 480 U.S. 273, 282 n.9, 107 S.Ct. 1123, 1128 n.9 (1987), 1986-87 EHLR 558:228 ("Congress' desire to prohibit discrimination based on the effects a person's handicap may have on others was evident from the inception of the Act").

[6] *See, e.g., Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372 (10th Cir. 1981) (medical school admissions committee denied a disabled student admission based on the erroneous conclusion that the student's multiple sclerosis would prevent him from serving as a psychiatric resident).

[7] *See* chapter 5 of this text, *supra*.

[8] *See, e.g., Butler v. Department of Navy*, 595 F. Supp. 1063 (D. Md. 1984) (employee fired because of absences, tardiness and insubordination); *Guertin v. Hackerman*, 25 Fair Empl. Prac. Cas. 207 (BNA) (S.D. Tex. 1980) (plaintiff not promoted due to shallow academic research and failure to work with faculty research group).

college, *and* because the blind applicant's college grades were not quite as high as those of other applicants. A technical reading of the Section 504 "solely on the basis of handicap" requirement would lead to the conclusion that the handicapped individual had not been impermissibly discriminated against within the meaning of Section 504. In the opinion of the authors, however, such an interpretation would defeat the purpose of Section 504, by allowing employers and program administrators easily to circumvent the spirit of the Act. A better reasoned view would be to apply the "but for" test applied in Title VII cases where an employer has mixed motives for refusing to hire or promote an employee protected by Title VII.[9] Under that test, an employer violates Title VII if it is found that *but for* the employee's sex the employer would have acted differently. By analogy, when an employer or program administrator relies in part on an individual's handicap when denying that individual access to employment, programs or services, it should be asked whether, *but for* the individual's handicap, the employer or program administrator would have acted differently. If the answer to that question is "yes," the employer or program administrator should be held to have violated Section 504.[10]

A recipient of federal financial assistance may not avoid Section 504's mandate against discrimination solely on the basis of handicap by simply claiming that there is a rational basis for the rejection of a handicapped applicant or for a rule that discriminates against handicapped persons. In *Pushkin v. Regents of the*

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[9] *See, e.g., Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568 (1977). In that case the Supreme Court held that when there is direct (rather than circumstantial) evidence that an employer's adverse action against an employee was based in part on a discriminatory motive, the employer must prove by a preponderance of the evidence that it would have reached the same decision but for the discriminatory motive. This "dual motive" standard has been applied in at least one administrative proceeding under Section 503 of the Rehabilitation Act. [*See* chapter 8 of this text, *infra*.] The Office of Federal Contract Compliance Programs of the DOL (OFCCP) held in *United States Department of Labor v. Norfolk and Western Railway Co.*, OFCCP Case No. 80-OFCCP-14 (Opinion of Assistant Deputy Undersecretary for Employment Standards dated December 8, 1986), that when an employer was alleged to have discriminated on the basis of handicap under Section 503 based on a "dual motive," the *Mt. Healthy City* test should be applied.

[10] A case in which two factors led to the allegedly discriminatory conduct at issue is *Ross v. Beaumont Hospital*, 687 F. Supp. 1115 (E.D. Mich. 1988). In that case a surgeon was fired from her job at a hospital due to her handicap (narcolepsy) *and* to her alleged "abusive behavior." After the jury awarded the plaintiff damages for employment discrimination in violation of Section 504, the district court awarded judgment notwithstanding the jury's verdict (j.n.o.v.) in favor of the defendants. The court stated:

> . . . the circumstances of [the plaintiff's] termination unequivocally show that Ross' abusive behavior was a more significant factor in the Defendants' decision to terminate her than the handicap issue. Thus, this [c]ourt concludes that she was not terminated solely on the basis of her handicap.

687 F. Supp. at 1118. The *Ross* court's "more significant factor" test could be analogous to the "but for" test, since if the non-handicapped related factor was the more significant factor leading to the plaintiff's termination it probably cannot be said that "but for" her handicap the plaintiff would not have been terminated.

University of Colorado[11] a university that refused to admit a handicapped applicant to one of its programs argued that when deciding whether Section 504 had been violated the court should apply a "rational basis" test similar to that applied under equal protection analysis.[12] Under the rational basis test applied when a plaintiff claims that a state has denied him equal protection of the law as required by the United States Constitution, the court is required to consider whether the governmental conduct at issue was rationally related to a legitimate goal of the state.[13] By analogy, the university argued in *Pushkin* that if its rejection of Dr. Pushkin was rationally related to the school's legitimate goals or needs, the court should find that Section 504 had not been violated. The Tenth Circuit disagreed, and held that:

> [Section 504] by its very terms does not provide that a recipient of federal financial assistance may act in an unreasonable manner to promote legitimate . . . means, even if discrimination should be the result. Rather, the statute provides that a recipient of federal financial assistance may not discriminate on the basis of handicap, regardless of whether there is a rational basis for so discriminating. The inquiry has to be on whether the University has, in fact, discriminated on the basis of handicap. The mere fact that the University acted in a rational manner is no defense to an act of discrimination . . . .[14]

Further, a recipient of federal financial assistance may not avoid the mandate of Section 504 by claiming that it did not *intentionally* discriminate against a handicapped person. In *Alexander v. Choate*[15] the Supreme Court recognized that discrimination against handicapped persons is often the result of benign indif-

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Another illustrative case is *Pierce v. Engle*, 726 F. Supp. 1231 (D. Kan. 1989). In that case the plaintiff acknowledged that he was terminated from his position due to his alcoholism *and* other factors. Thus, the court held that the plaintiff could not withstand a motion for summary judgment in favor of the defendant because the plaintiff had "failed to create a genuine issue of material fact, i.e., one from which a reasonable jury could find in his favor, regarding whether his status as a recovering alcoholic was the sole reason for the nonrenewal." 726 F. Supp. at 1234. In that case the court did not consider which factor was the most significant in causing the plaintiff's termination or whether the plaintiff would have been terminated "but for" his handicap. Rather, the court implied that if another factor — in addition to the handicap — plays any part in the determination to take the action at issue, the "solely by reason of his handicap" test will not be satisfied.

[11] 658 F.2d 1372 (10th Cir. 1981).

[12] *See* chapter 2 of this text, *supra*.

[13] *See, e.g.*, *Vance v. Bradley*, 440 U.S. 93, 99 S. Ct. 939 (1979) (defining the rational basis test in the context of an alleged violation of the Fifth Amendment equal protection clause); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S. Ct. 2562 (1976) (defining the rational basis test in the context of an alleged violation of the Fourteenth Amendment equal protection clause).

[14] 658 F.2d at 1383.

[15] 469 U.S. 287, 105 S. Ct. 712 (1985).

ference or paternalistic attitudes, rather than a result of hostile animus.[16] Consequently, the Court opined that "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent."[17] The Court held, therefore, that it is not necessary to find discriminatory intent before a cause of action may lie under Section 504; rather, actions that are not intentional (that do not constitute disparate *treatment),* but that have a disparate *impact* on handicapped people, may be impermissibly discriminatory under the Act.[18] Other courts have held that actions having a disparate impact on handicapped persons contravene the mandate of Section 504.[19]

II. Special Issues Relating to Education

Because most school districts, colleges and universities receive federal financial assistance, claims under Section 504 are often raised in the educational context, both with respect to elementary and secondary education and with respect to post-secondary education. The specific issues to be resolved in the two situations, however, are quite diverse.

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[16] 469 U.S. at 295, 105 S. Ct. at 717 ("[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference — of benign neglect"). *See also, Pushkin v. Regents of the University of Colorado,* 658 F.2d at 1385 (discrimination on the basis of handicap is not usually premised on a hostile discriminatory purpose or subjective intent to discriminate; rather, such discrimination "usually results from more invidious causative elements and often occurs under the guise of extending a helping hand or a mistaken, restrictive belief as to the limitations of handicapped persons").

[17] 469 U.S. at 296-97, 105 S. Ct. at 717.

[18] The Court noted, however, that *all* actions taken by recipients of federal financial assistance that have a disparate impact on handicapped persons are not necessarily discriminatory in violation of Section 504. Indeed, in *Alexander v. Choate* the Court failed to find an impermissible disparate impact. In that case, Medicaid recipients in Tennessee claimed that a change in the state's Medicaid policy, which reduced from 20 to 14 the number of in-patient hospital days per fiscal year that Tennessee Medicaid would pay hospitals on behalf of a Medicaid recipient, violated Section 504. The Court rejected the claim that, because handicapped people generally require more hospitalization than non-handicapped people, the regulation had an impermissible disparate impact on the handicapped. The Court held that both handicapped and non-handicapped people had meaningful and equal access to the benefit of obtaining 14 days per year of hospital coverage.

[19] *See, e.g., Larry P. v. Riles,* 793 F.2d 969 (9th Cir. 1984) (school's IQ tests violated Section 504 because they had a disparate impact on black students in assessing educable mental retardation); *Begay v. Hodel,* 730 F. Supp. 1001, 1015 (D. Ariz. 1990) (denying defendant's motion for summary judgment on plaintiff's Section 504 action where the facts "suggest that there was a disparate impact involved, e.g., the school officials' failure to take meaningful action when presented with architectural deficiencies that act as barriers to the handicapped"). *See also, New Mexico Association for Retarded Citizens v. State of New Mexico,* 678 F.2d 847, 854 (10th Cir. 1982) ("Section 504 plaintiffs need not prove discriminatory intent") (citing *Pushkin v. Regents of the University of Colorado,* 658 F.2d at 1384); *Sanders v. Marquette Public Schools,* 561 F. Supp. 1361, 1372 (W.D. Mich. 1983) (discriminatory intent not a requisite element of a claim under Section 504).

A. Elementary and Secondary Education

1. Who Is a Handicapped Student Under Section 504?

At the outset it should be noted that disabled children are protected from discrimination in the elementary and secondary educational context under both Section 504 and the Education for All Handicapped Children Act (EAHCA).[20] As fully explained in later chapters of this text, the EAHCA sets forth very detailed and comprehensive rules for states to follow when providing handicapped children with a "free appropriate public education" (FAPE).[21] Unlike the EAHCA, Section 504 does not set out comprehensive rules for school districts to follow when educating handicapped children, although the regulations promulgated pursuant to Section 504 by the United States Department of Education (DOE) do set out some specific criteria for school districts to follow when providing special educational services to handicapped children.[22] The DOE regulations provide, however, that with respect to the provision of a FAPE, a school district's compliance with the EAHCA is one means of complying with Section 504.[23]

More importantly, the EAHCA only protects children who, by virtue of their handicaps, require *special educational* services.[24] Section 504, however, prohibits discrimination against all handicapped school-age children, regardless of whether they require special educational services. "Qualified" handicapped persons with respect to the provision of elementary and secondary educational services by schools or school districts that are recipients of federal financial assistance include children who are:

> (i) of an age during which nonhandicapped persons are provided such services,
>
> (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or

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[20] 20 U.S.C.A. §§1400(a)-1485 (1990).

[21] *See* chapters 13 through 18 of this text, *infra*.

[22] 34 C.F.R. §§104.31-104.38 (1989).

[23] *See* 34 C.F.R. §104.33(b)(2) (1989) ("Implementation of an individualized education program developed in accordance with the [EAHCA] is one means of meeting the standard established in paragraph (b)(1)(i) of this section [relating to the provision of an appropriate education]"). [For a discussion of individualized educational programs *see* chapters 13 and 18 of this text, *infra*]. *See also*, 34 C.F.R. §104.36 (1989) (requiring that procedural safeguards be provided to allow parents or guardians of handicapped children who need special educational services to be a part of the decisionmaking process with respect to the provision of such services, and stating that "[c]ompliance with the procedural safeguards . . . [set forth in the EAHCA] is one means of meeting this requirement"); 34 C.F.R. §104.35(d) (1989) (requiring periodic reevaluation of handicapped students who have been provided with special educational services, and noting that "[a] reevaluation procedure consistent with the [EAHCA] is one means of meeting this requirement").

[24] *See* chapter 13 of this text, *infra*.

> (iii) to whom a state is required to provide a free appropriate public education [under the EAHCA].[25]

Thus, for example, suppose that a school district prohibited a child with a glass eye from playing on a football team due to concern that the child might injure his normal eye. The child could not state a claim under the EAHCA because, despite his glass eye, he does not require special education. The child could, however, claim under Section 504 that he was being discriminated against solely on the basis of handicap.[26] A case on point is *Poole v. South Plainfield Board of Education*.[27] In that case the court held that a high school violated Section 504 when it prohibited a student with one kidney from participating on the wrestling team out of fear that he would injure his remaining kidney. The court held that where the school was aware that the boy's parents knew of the inherent dangers and rationally reached a decision to encourage their son's participation in wrestling despite his handicap, the school could not deny the student his right to participate in the wrestling program.[28] To the converse, in *Kampmeier v. Nyquist*[29] the court held that junior high school students with vision in one eye were not entitled under Section 504 to a preliminary injunction against school officials who refused to allow them to participate in contact sports. The court relied on medical testimony relating to the high risk of eye injury from contact sports, and held that public school officials have a *parens patriae* interest in protecting the well-being of their students.[30] The difference between the courts' decisions in *Poole* and *Kampmeier* may be premised in part on the fact that *Poole* involved a high school student while *Kampmeier* involved junior high school students. As the child gets older, courts may give weight to a decision jointly entered into by the child and his or her parents.[31]

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[25] 34 C.F.R. §104.3(k)(2) (1989).

[26] The child would meet the threshold test of having a handicap either by virtue of his glass eye or by virtue of the fact that the school district *regarded* him as handicapped. The issue in dispute, of course, would be whether the child was otherwise qualified to play football.

[27] 490 F. Supp. 948 (D.N.J. 1980).

[28] *Accord, Grube v. Bethlehem Area School District*, 550 F. Supp. 418 (E.D. Pa. 1982) (granting preliminary injunction requiring high school to allow mature student with one kidney, who appreciated the risks of his actions, to play football).

[29] 553 F.2d 296 (2d Cir. 1977).

[30] A somewhat different claim was raised in *Cavallaro v. Ambach*, 575 F. Supp. 171 (W.D.N.Y. 1983). In that case, a 19-year-old high school senior with a neurological impairment that caused learning disabilities was barred from participating on the interscholastic wrestling team due to a school rule prohibiting students over 18 from competing on interscholastic athletic teams. The plaintiff claimed that he was being discriminated against solely on the basis of handicap in violation of Section 504, and sought a preliminary injunction compelling the school to allow him to participate on the team. The court concluded that the plaintiff was unlikely to succeed on the merits of his Section 504 claim, and thus denied the plaintiff's motion. The court held that the regulation at issue was designed to guard against older, more experienced athletes having an advantage over younger athletes and to prevent injuries to younger players. Because the plaintiff's physical skills were equal to or superior to other 19-year-olds the rule did not discriminate against him because of his handicap but rather was premised on preventing someone of his size and strength from harming younger students. *Accord, Mahan v. Agee*, 652 P.2d 765

There are numerous other instances where Section 504, but not the EAHCA, might apply to school age children. One such instance involves a child who suffers from an illness that has not progressed to the point where the child requires special education, but whose illness does affect the child to such degree that reasonable accommodations are required to allow the child to continue in the regular classroom. To cite just three examples: (1) a child with a moderate case of cystic fibrosis could attend regular classes if reasonably accommodated by the provision of respiratory therapy services during the day; (2) a child with sickle-cell anemia could attend regular classes if reasonably accommodated by the provision of home or hospital tutoring during infrequent crisis situations that necessitated absence from school; and (3) a child with spina bifida might be capable of attending regular classes if reasonably accommodated by the provision of catheterization services.[32]

By way of illustration, in *Elizabeth S. v. Thomas K. Gilhool*[33] plaintiffs filed a class-action suit under Section 504 protesting the failure of a public school district to provide related services to children with disabilities who did not require special education. The representative plaintiffs in that action are: (1) an insulin-dependent diabetic child who is able to attend regular classes if she is provided snacks at regular intervals and if school personnel, such as the child's teacher, are able to administer blood sugar level tests and injections of glucagon; and (2) a hydrocephalic child who utilizes crutches and braces who is able to attend regular classes if catheterization services are provided by school personnel during the school day, specialized transportation services are provided by the school district, and modifications are made to the school's regular physical education program. During the course of litigation the parties entered into a stipulation of settlement whereby the Commonwealth of Pennsylvania promulgated regulations for school districts to

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(Okla. 1982) (school district that refused to allow a 19-year-old student with dyslexia to participate in interscholastic track events did not violate Section 504 since the rule was applied to *all* 19-year-old students, not just to 19-year-old handicapped students).

[31] In at least one case it has been held that a handicapped college student was able to appreciate and consider the risks involved in engaging in contact sports activities. *See* text at notes 141-42 of this chapter, *infra* (discussing *Wright v. Columbia University*, 520 F. Supp. 789 (E.D. Pa. 1981)).

[32] With respect to the latter situation, *see, e.g.*, *Hairston v. Drosick*, 423 F. Supp. 180 (S.D. W. Va. 1976) (exclusion of a child with spina bifida from the regular classroom without a *bona fide educational* reason violated Section 504).

[33] No. C.A. 86-0218, slip op. (M.D. Pa. November 27, 1989).

follow when providing supportive services to disabled school children in regular classrooms as required by Section 504.[34]

Another illustrative case involving a situation in which Section 504, but not the EAHCA, is applicable in the context of elementary or secondary education is *Doe v. Belleville Public School District*.[35] In that case a school district ruled that a hemophiliac child who was diagnosed as having AIDS could not attend public school classes but would be provided with a tutor in his home. The child claimed that the school district had impermissibly discriminated against him in contravention of Section 504. The school district argued that the plaintiff's Section 504 claim was improper because the plaintiff had not exhausted his administrative remedies under the EAHCA.[36] The court, therefore, was required to consider whether the fact that the child had AIDS meant that the child was covered under the EAHCA, as well as under Section 504; if so the child would be required to exhaust his administrative remedies under the EAHCA prior to filing suit under Section 504. The court held that the child was not covered by the EAHCA, but was covered by Section 504. Although the child was diagnosed as having AIDS, the disease had not progressed to the point that the child required special education. The court concluded that the "EAHCA would apply to AIDS victims *only* if their physical condition is such that it adversely affects their educational performance; *i.e.*, their ability to learn and to do the required classroom work."[37]

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[34] *Id.* More recently, parents of self-abusive children have filed actions under Section 504 protesting school district's refusals to allow their children to wear electric shock devices that discourage head banging (known as Self-Injurious Behavior Inhibiting Systems [SIBIS]) to school. *See, e.g., Phelan v. Bell*, No. 89-CV-73708 DT (S.D. Mich., complaint filed December 28, 1989); *Vanduser v. Intermediate School Board of the Intermediate School District of Genesee*, No. 89-CV-40289 FL (S.D. Mich. 1989). In the latter case the parties entered into a stipulation on October 17, 1989 agreeing that the child could attend school with the SIBIS device. (*Vanduser v. Intermediate School Board of the Intermediate School District of Genesee*, No. 89-40289 (S.D. Mich., stipulation of the parties of October 17, 1989).

[35] 672 F. Supp. 342 (S.D. Ill. 1987).

[36] *See* chapter 3 of this text (noting that, while a plaintiff does not have to exhaust administrative remedies prior to filing suit under Section 504, if the plaintiff files an action under both the EAHCA and Section 504 he must exhaust his EAHCA administrative remedies prior to filing suit under Section 504).

[37] 672 F. Supp. at 345 (emphasis in original). In so holding, the court relied in part on a DOE ruling stating that a child with AIDS is not considered to be handicapped under the EAHCA unless he or she needs special education. 2 EHA Rulings, EHLR 211:343, 211:344 (October 26, 1984). *See also*, OCR Staff Memorandum of April 5, 1990 from William L. Smith, Acting Assistant Secretary for Civil Rights, 16 EHLR 712 (noting that children with AIDS and Aids Related Complex (ARC) are handicapped within the meaning of Section 504 if they meet the age-related requirements of 34 C.F.R. §104.3(k)(2) (1989)). With respect to the question of how a free, appropriate public education should be provided to a child with AIDS or ARC, Acting Secretary Smith opined that

> case law would lead to the conclusion that, unless the child currently presents a risk of contagion due to the stage of the disease (*e.g.*, a contagious opportunistic infection, open lesions that cannot be covered) or parents and school agree on an alternative, a child infected with AIDS would remain in the regular classroom before the placement

An interesting case in which the plaintiff asserted a cause of action under Section 504, but not under the EAHCA, is *Sullivan v. Vallejo City Unified School District*.[38] In that case a 16-year-old high school student with multiple disabilities sought a court order requiring the school district to allow her to be accompanied at school by her service dog. The court held that the plaintiff properly stated a cause of action under Section 504, and that the plaintiff did not have to exhaust her administrative remedies under the EAHCA. The court stated:

> . . . once plaintiff has made a threshold showing that her decision to use the service dog is reasonably related to her disability, the sole issue to be decided under [S]ection 504 is whether defendants are capable of accommodating the plaintiff's choice to use a service dog. The issue of whether the service dog enhances plaintiff's educational opportunities, which is central to the [EAHCA] inquiry, is completely irrelevant under [S]ection 504. It thus cannot be said that the relief sought by the plaintiff . . . is available under the [EAHCA]. Accordingly, plaintiff need not exhaust the [EAHCA] administrative remedies . . . .[39]

Cases involving students who are alcoholics or drug addicts also raise issues under Section 504 but not under the EAHCA. While alcoholics and drug addicts are handicapped within the meaning of Section 504,[40] they generally will not be classified as handicapped children protected by the EAHCA. Section 504, however, does not prevent a school district from prohibiting students who are drug addicts or alcoholics from complying with rules relating to the possession of drugs and alcohol. The DOE Section 504 regulations provide:

> Of great concern to many commentators was the question of what effect the inclusion of drug addicts and alcoholics as handicapped persons would have on school disciplinary rules prohibiting the use or possession of drugs or alcohol by students. Neither such rules nor their application to drug addicts or

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> decision is made. Where a child is temporarily excluded from school because of current risk of contagion, the exclusion would continue no longer than the duration of the contagious disease. Moreover, the exclusion for reasons of current contagiousness should not preclude or delay proceeding with the placement decisionmaking process.

16 EHLR at 714.

Other cases in which children with AIDS asserted claims under Section 504 are discussed in chapter 5 of this text, *supra*.

[38] 731 F. Supp. 947, 16 EHLR 597 (E.D. Cal. 1990).

[39] 731 F. Supp. at 951.

[40] *See* chapter 4 of this text, *supra*.

> alcoholics is prohibited by this regulation, provided that the rules are enforced evenly with respect to all students.[41]

Other instances in which claims might be asserted under Section 504 but not under the EAHCA arise when school districts provide services beyond those required by the EAHCA to nonhandicapped children, but do not provide such services to handicapped children. In *Council for the Hearing Impaired v. Ambach*,[42] for example, the court explained that if "the state of New York provides teacher services to public schools beyond that which would be required by the [EAHCA], the allegedly discriminatory denial of those services to . . . [handicapped] students, through lower teacher salaries, could possibly state a claim under [Section] 504."[43] The court cited the DOE Section 504 regulation providing that under Section 504 an appropriate education is one that "meet[s] the individual educational needs of handicapped [children] as adequately as the needs of nonhandicapped [children] are met . . . ."[44]

Further, in some situations not involving the provision of a FAPE, the regulations promulgated under Section 504 may delineate specific rules (not set forth under the EAHCA) that must be followed to ensure compliance with Section

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[41] 34 C.F.R. Part 104 App. A 366 (1987). The issue of when and to what extent a school district may discipline handicapped students (including alcoholics and drug addicts) under both the EAHCA and Section 504 is very complex. That issue is discussed in detail in chapter 14 of this text, *infra*

[42] 610 F. Supp. 1051 (E.D.N.Y. 1985).

[43] 610 F. Supp. at 1057 (footnote omitted). In so ruling the court relied on the Supreme Court's statement in *Smith v. Robinson*, 468 U.S. 992, 1019, 104 S. Ct. 3457, 3472 n.22 (1984), that although the EAHCA preempted remedies under Section 504 in situations where Section 504 merely provides the same rights as those that are available under the EAHCA, where a school district provided "services beyond those required by the [EAHCA], but discriminatorily denied those services to a handicapped child, [Section 504] would remain available . . ." as a source of relief. As explained fully in chapter 17 of this text, *infra*, as a result of *Smith v. Robinson* in 1986 Congress passed the Handicapped Children's Protection Act (HCPA) to overturn the Supreme Court's ruling that the EAHCA limits the rights, procedures and remedies available to handicapped children under other federal statutes (such as Section 504). (When a handicapped child asserts rights under both Section 504 and the EAHCA, however, 20 U.S.C.A. §1415(f) (West Supp. 1990) requires exhaustion of the EAHCA administrative procedures first.) The HCPA, 20 U.S.C.A. §1415(f) (West Supp. 1990), however, has no bearing on the issue of when a handicapped child would have an action under Section 504 when no action is available under the EAHCA.

Before passage of the HCPA, in an attempt to "harmonize [Section 504] and the EAHCA to the fullest extent possible, and to give each of these statutes the full play intended by Congress," a few courts held that a school district did not violate Section 504 by failing to adhere to the dictates of the EAHCA unless the school district had acted intentionally or in bad faith. *Monahan v. State of Nebraska*, 687 F.2d 1164, 1171 (8th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983); *accord Johnston v. Ann Arbor Public Schools*, 569 F. Supp. 1502 (E.D. Mich. 1983); *Acton v. Bennett*, No. Civ. Act. 86-3638-MA, slip op. (D. Mass. June 23, 1987). These rulings appear to be invalidated by the HCPA.

[44] 34 C.F.R. §104.33(b)(1) (1989). Cited at 610 F. Supp. at 1057.

504. In *Students of California School for the Blind v. Honig*[45] parents of blind students at a state residential school claimed that the California Department of Education's decision to move the school to an allegedly earthquake-prone area violated both the EAHCA and Section 504. When considering the plaintiffs' motion for a preliminary injunction, the court determined whether the plaintiffs' seismic safety claims were likely to succeed under either or both of those acts. The Ninth Circuit noted that while the "EAHCA is more specific than [Section 504] as to educational programs, [Section 504] is more specific [than the EAHCA] as to physical facilities."[46] Thus the circuit court held that the plaintiffs had "presented a serious question as to the availability of relief under [Section 504]."[47]

2. Procedural and Substantive Aspects of Section 504

School districts have both procedural and substantive obligations towards school-age children deemed handicapped under Section 504.[48] Procedurally, the DOE

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[45] 736 F.2d 538 (9th Cir. 1984), *reh'g en banc denied*, 745 F.2d 582 (9th Cir. 1984), *vacated and remanded on other grounds*, 471 U.S. 148, 105 S. Ct. 1820 (1985).

[46] 736 F.2d at 547. The court was referring to the Department of Health and Human Services regulation, 45 C.F.R. §84.34(c) (1989), providing that, with respect to educational services:

> *Comparable facilities:* If a recipient . . . operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient.

[47] *Id.* This decision was rendered in 1984, prior to the enactment of the 1986 HCPA. [*See* note 43 of this chapter, *supra*.] Thus the court followed the pre-1986 rule that plaintiffs could not file suit under Section 504 for claims that were preempted under the EAHCA. Even applying that rule, however, the court found that different claims for relief might exist under the two Acts. Consequently, the case remains a viable precedent for explaining situations (following passage of HCPA) in which a plaintiff may have a claim under Section 504 although no claim under the EAHCA exists.

[48] School districts are required to comply with their Section 504 obligations *and* their obligations under the EAHCA. By way of example, in 1989 the DOE's OCR investigated the Laconia School District to determine whether the district was in compliance with Section 504. Specifically, the OCR sought to determine whether the district was complying with 34 C.F.R. §104.35 (1989) (requiring school districts to have and follow procedures for evaluating students perceived as having a handicap and making placement decisions with respect to such students); 34 C.F.R. §104.34(a) (1989) (requiring that school district policies ensure that handicapped students are educated with non-handicapped students to the maximum extent possible); and 34 C.F.R. §104.36 (1989) (requiring that school districts implement and follow a system of procedural due process with respect to identification, notification, evaluation and placement of handicapped students). The OCR determined, *inter alia*, that the district improperly applied a specific testing measure to only one class of disabled students in contravention of 34 C.F.R. §104.35(c) (1989). The school district contended that OCR's interpretation of that regulation was too broad. The school district requested an opinion from the Office of Special Education Programs (OSEP), which is responsible for administering Part B of the EAHCA. (See chapter 13 of this text, *infra*, for a

Section 504 regulations require school districts receiving federal financial assistance to "establish standards and procedures for the evaluation and placement" of disabled students who require either special education or related services.[49] A school district that fails to establish such procedures and to conduct the requisite evaluation of a disabled student will be held in violation of Section 504.[50] Thus, in *Rialto (CA) Unified School District*[51] the DOE's Office of Civil Rights (OCR) held that although the school district's assessment and placement of a student with an attention deficit disorder and consequential behavioral problems met state and federal requirements under the EAHCA, the district violated Section 504 when it ignored evidence of severe behavioral problems which under Section 504 substantially limited a major life activity such as the ability to learn or attend school.[52] OCR required the school district to revise its procedures for evaluating students

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discussion of Part B of the EAHCA.) Specifically, the school district sought an opinion as to whether the OCR's interpretation of a Section 504 regulation took precedence over an EAHCA regulation when determining whether an agency was in compliance with the law. OSEP responded as follows:

> The [EAHCA] and Section 504 are different statutes that may contain different compliance standards. States and school districts are required to comply with both [EAHCA] and Section 504 requirements in the provision of special education services. Therefore, OCR's interpretation of Section 504 regulations does not take precedence over OSEP's interpretation of [EAHCA] regulations and OSEP's interpretation of [EAHCA] regulations does not take precedence over OCR's interpretation of Section 504 regulations.

Kennedy, 16 EHLR 226, 232-33 (OSEP 1989).

[49] 34 C.F.R. §§104.35(b), 104.36 (1989). Good practice would dictate delineating such standards and procedures as Section 504 standards and procedures, even if they are the same as the procedures utilized under the EAHCA, in order to comply with 34 C.F.R. §104.33(b)(1)(ii) (1989).

DOE's Office for Civil Rights has noted, however, that the EAHCA regulation regarding evaluation of disabled children:

> . . . is more specific than the Section 504 regulation about the evaluation process. The [EAHCA] regulation requires that children be reevaluated "every three years or more frequently if conditions warrant or if the child's parent or teacher requests an evaluation." . . . In contrast, Section 504 requires evaluation of any child believed to need special education before initial placement and any significant change in placement. [34 C.F.R. §104.35(a)] Further, it requires "periodic reevaluation," adding that a reevaluation procedure consistent with the [EAHCA] is one means of meeting this requirement. [34 C.F.R. §104.35(d)].

Memorandum to OCR Senior staff from LeGree S. Daniels, Assistant Secretary for Civil Rights, U.S. Department of Education (October 24, 1988), EHLR 307:01-05 ("OCR Senior Staff Memorandum").

[50] *Id.*

[51] (OCR 1989), 14 EHLR 353:201.

[52] *Id.*

with behavioral problems and to conduct a workshop for district personnel on "their duties and responsibilities under Section 504."[53]

Substantively, as explained in the previous subsection of this chapter, Section 504 obligates school districts receiving federal financial assistance both to provide reasonable accommodations and to refrain from discriminating against disabled students.[54] Where Section 504 is at issue, the focus is on non-discrimination or the provision of reasonable accommodations, rather than on the provision of a FAPE. When reasonable accommodations are necessary to provide non-discriminatory educational services to a handicapped child, however, the requisite accommodations should be documented in an educational plan for that child.[55]

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[53] *Id. at 353:204.*

Similarly, in New Mexico Association for Retarded Citizens v. New Mexico, 678 F.2d 847, 855 (10th Cir. 1982), the Tenth Circuit remanded the case to the district court to determine whether the state violated Section 504 when it failed, *inter alia*, to "adequately diagnose and identify those handicapped children requiring special education attention and program modification. . . ." *See also, Mineral County (NV) School District*, 16 EHLR 668 (OCR 1990) (a school district that had reason to believe that a student needed special education due to a handicapping condition violated 34 C.F.R. §104.35 (1989) when it failed to evaluate the student in a timely manner, but suspended the student without a prior evaluation). In *Mineral County*, the OCR required the school district to provide assurances that the district would (1) implement policies and procedures for identifying and evaluating handicapped students, and (2) provide in-service training to all staff regarding the need to refer for evaluation students believed or suspected of having a handicapping condition.

[54] The regulations promulgated pursuant to Section 504 specify certain actions that school districts must take to avoid discriminating on the basis of handicap. 34 C.F.R. §104.22 (1989), for example, requires school districts to "operate each program or activity . . . so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons." In *Lafayette (IN) School Corporation*, 16 EHLR 301 (OCR 1989), the DOE's OCR found that a school district violated this regulation by maintaining obstacles in one of the district's schools. Similarly, the OCR found that a portion of a district school that was built in 1981 contained accessibility obstacles in violation of 34 C.F.R. §104.23(a) (1989), which requires school districts to ensure that all newly constructed facilities are "readily accessible to and usable by handicapped persons." *Id.*

To cite another example, in *Caddo Parrish (LA) School System*, 16 EHLR 326 (OCR 1989), the DOE's OCR found that a school district violated the Section 504 regulations by requiring mobility-impaired children to ride buses to and from school for longer periods of time than non-handicapped children. Specifically, the OCR held that the school district failed to comply with 34 C.F.R. §§104.4(a) (1989) (prohibiting discrimination on the basis of handicap), 104.4(b)(1)(ii)-(iv) (1989) (requiring the provision of aids, benefits and services to handicapped persons that are equal to those afforded non-handicapped persons), and 104.37(a) (1989) (requiring the provision of nonacademic and extracurricular services "in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities"). Similarly, in *Angleton (TX) Independent School District*, 16 EHLR 299 (OCR 1989), the OCR found that a school district violated Section 504 when it failed to provide speech therapy to a disabled child in accord with the child's IEP in contravention of 34 C.F.R. §§104.33(a) and 104.33(b)(1) (1989) (requiring the provision of a FAPE to disabled children).

There are a multitude of OCR decisions discussing the scope of the Section 504 regulations. An exhaustive discussion of all those decisions is beyond the scope of this text. The OCR decisions may be found generally in the *Education for the Handicapped Law Report*.

[55] *See, e.g.*, 34 C.F.R. §§104.33, 104.35, 104.36 (1989).

Even where reasonable accommodations are not required, a school district may not discriminate against a child classified as handicapped under Section 504. An illustrative case involving discrimination absent a claim for reasonable accommodations is *Riley v. Jefferson County Board of Education.*[56] In that case, a school district charged disabled students who attended the district's after-school program according to a cost-based sliding fee scale, which required disabled students to pay more for after-school care than their non-disabled peers. The school district maintained that the fee scale was necessary since, if the disabled students did not absorb the extra costs of providing care to such students, those extra costs would have to be passed on to all children attending the program. The court held that the fee scale was discriminatory in violation of Section 504, because the district had not proven that it would require a substantial modification of its program or an undue expense for the district to serve disabled children.

With respect to the provision of a FAPE for children classified as handicapped under both the EAHCA and Section 504, however, it has been noted that Section 504 does not impose any greater duty on school districts than that imposed by the EAHCA. In *Darlene L. v. Illinois State Board of Education*[57] the court stated:

> [T]he court declines to hold that §504 of the Rehabilitation Act, a broad brush statute enacted to prohibit discrimination against the handicapped, imposes a greater duty on states to provide educational services to handicapped [children] than the [EAHCA], an act specifically addressed to special education which explicitly details the educational services states must provide to receive federal funds. Congress could not have intended to impose such a great financial burden on states by the general sweeping language of [Section] 504 without an explicit requirement . . . .[58]

This reasoning is supported by the fact that the DOE regulations provide in three places that compliance with EAHCA requirements with respect to the provision of a FAPE would satisfy the requirements of Section 504.[59] Several courts have also noted that compliance with EAHCA standards with respect to the provision of a FAPE constitutes compliance with Section 504.[60]

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[56] 15 EHLR 441:632 (N.D. Ala. 1989).

[57] 568 F. Supp. 1340 (N.D. Ill. 1983), 1982-83 EHLR 554:532.

[58] 568 F. Supp. at 1346.

[59] *See* note 23 of this chapter, *supra*.

[60] *See, e.g., Barnett v. Fairfax County School Board,* 721 F. Supp. 757 (E.D. Va. 1989), 15 EHLR 441:633 (noting that compliance with the EAHCA with respect to the provision of a free appropriate education constitutes compliance with Section 504, and holding that a school district's decision to centralize interpreter services for all hearing-impaired children in the district at one school did not violate either Act); *St. Louis Developmental Disabilities Treatment Center Parents Association v. Mallory,* 591 F. Supp. 1416, 1465 (W.D. Mo. 1984), 1984-85 EHLR 556:117, 139 (stating that "compliance with the requirements of the [EAHCA] establishes compliance with Section 504," and holding that a school district's maintenance of separate schools for profoundly handicapped children

While compliance with the EAHCA is one means of complying with Section 504, non-compliance with the EAHCA will not necessarily indicate non-compliance with Section 504. As the DOE's OCR has explained, with respect to the provision of a FAPE:

> . . . the implementation of an IEP that meets [EAHCA] standards will also meet the requirements of Section 504; however, implementation of an [Individualized Education Program[61]] that fails to meet the requirements of the [EAHCA] does not necessarily violate Section 504. Instead, OCR will look to see whether the services identified during the evaluation process are being provided to the child.[62]

The OCR further explained:

> Since consistency with the [EAHCA] is only one means of complying with these three provisions of the Section 504 regulation[s] [dealing with the provision of a FAPE] . . . *noncompliance* determinations cannot rest solely on a conclusion that a recipient has not met the standards of the [EAHCA]. While a recipient may comply with these three sections of the Section 504 regulation[s] by complying with the [EAHCA], failure to meet the [EAHCA] standards does not necessarily constitute a violation of Section 504, and must not be the basis for OCR's analytic approach or conclusion.[63]

3. Claims Under Both the EAHCA and Section 504

Claims under Section 504 are often filed in conjunction with claims under the EAHCA. Thus, Section 504 (as well as the EAHCA) has been successfully utilized

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did not violate either Act), *aff'd*, 767 F.2d 518 (8th Cir. 1985), 1985-86 EHLR 557:104. *See also*, *Pinkerton v. Moye*, 509 F. Supp. 107 (W.D. Va. 1981) (refusal to establish a self-contained learning disabilities program in the district in which the plaintiff student lived did not violate Section 504) (placing the child in a self-contained program in a neighboring school district constituted the requisite reasonable accommodation under Section 504; requiring the establishment of self-contained programs in every school district would require substantial modifications not mandated by that Act); *Gladys J. v. Pearland Independent School District*, 520 F. Supp. 869 (S.D. Tex. 1981) (school child's placement inappropriate under both the EAHCA and Section 504).

[61] For a discussion of Individual Education Programs *see* chapters 13 and 18 of this text, *infra*.

[62] OCR Senior Staff Memorandum, *supra* note 49, EHLR 307:01.

[63] *Id*. (emphasis in original).

It should be noted that in *Howell v. Waterford Public Schools*, 731 F. Supp. 1314 (E.D. Mich. 1990), the court held that "in order to show a violation of [Section 504], something more than a mere failure to provide the 'free appropriate education' required by the EAHCA must be shown." [731 F. Supp. at 1317]. That court further stated:

> The reference in [Section 504] to "discrimination" must require, we think, something more than an incorrect evaluation, or a substantively faulty individualized education plan, in order for liability to exist. Experts often disagree on what the special needs of a handicapped child are, and the educational placement of such children is often

by plaintiffs claiming that school districts did not provide the same number of hours of educational services to handicapped children as were provided to nonhandicapped children. In *Yaris v. Special School District of St. Louis County*[64] the court held that the state of Missouri violated Section 504 when it utilized federal funds to provide educational programs for non-handicapped children during the summer months but did not provide such summer programs for handicapped children. The ruling in *Yaris* has been followed in at least one administrative case.[65]

Another interesting case in which actions were filed under both the EAHCA and Section 504 is *Brookhart v. Illinois State Board of Education*.[66] In that case, handicapped elementary and secondary students challenged a school district's requirement that they must pass Minimal Competency Tests (MCTs) as a prerequisite to receiving high school diplomas. Plaintiffs claimed that Section 504 required the school district to alter the content of the MCT in order to accommodate their inability to learn the tested materials due to their handicaps. The Seventh Circuit disagreed, stating:

> Altering the content of the MCT to accommodate an individual's inability to learn the tested material because of his handicap would be a "substantial modification," as well as a "perversion" of the diploma requirement. A student who is unable to learn because of his handicap is surely not an individual who is qualified in spite of his handicap. Thus denial of a diploma

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> necessarily an arguable matter. That a court may, after hearing evidence and argument, come to the conclusion that an incorrect evaluation has been made, and that a different placement must be required under [the] EAHCA, is not necessarily the same thing as a holding that a handicapped child has been discriminated against solely by reason of his or her handicap . . . .
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> We do not read [Section] 504 as creating general tort liability for educational malpractice. . . . We think, rather, that either bad faith or gross misjudgment should be shown before a [Section] 504 violation can be made out, at least in the context of education of handicapped children.

Id.

[64] 558 F. Supp. 545 (E.D. Mo. 1983), *aff'd*, 728 F.2d 1055 (8th Cir. 1984).

[65] *See In the matter of Office for Civil Rights, U.S. Department of Education v. Missouri State Department of Elementary and Secondary Education and Missouri State Board of Education* (Case No. 84-504-3; Decision of Administrative Law Judge dated April 3, 1987) (available from the Office for Civil Rights, U.S. Department of Education). In that case the administrative judge ruled that a state's policy of providing all non-handicapped children with six hours of schooling a day while providing all handicapped children with five hours of schooling a day violated Section 504.

See also, Georgia Association of Retarded Citizens v. McDaniel, 716 F.2d 1565 (11th Cir. 1983) (Georgia's policy or practice of refusing to consider the needs of mentally retarded children in excess of the traditional 180-day school year violated Section 504 as well as the EAHCA), *vacated on other grounds*, 468 U.S. 1213 (1984).

[66] 697 F.2d 179 (7th Cir. 1983).

> because of inability to pass the MCT is not discrimination under [Section 504].[67]

The court explained, however, that "an otherwise qualified student who is unable to disclose the degree of learning he actually possesses because of the test format or environment would be the object of discrimination solely on the basis of his handicap."[68] By way of example, the court noted that " 'to discover a blind person's knowledge, a test must be given orally or in braille. . . .' "[69]

Section 504 has been raised (in addition to the EAHCA), albeit unsuccessfully, in the context of the provision of transportation services for a disabled student. In *Hurry v. Jones*[70] the plaintiff, a 17-year-old physically and mentally handicapped young man, was confined to a wheelchair. For several years the city transported Hurry from his home to school each day, which necessitated that the school bus drivers carry Hurry from the front door of his home, down 12 stairs to the sidewalk, and onto the bus. When Hurry reached 160 pounds the drivers refused to carry him. Subsequently Hurry's family began transporting him to and from school. After being picked up from school, Hurry was required to wait in his father's van at his father's place of business for several hours until his father left work and could take Hurry home and carry him into the house. This arrangement caused Hurry to experience physical and emotional problems, and thus Hurry was removed from school. Hurry's parents requested that the school provide transportation assistance to allow Hurry to attend school. When the school refused to do so, Hurry's parents filed suit under both the EAHCA and Section 504. With respect to Hurry's Section 504 claim, the district court held that " 'finding an appropriate way in which to get George Hurry from his home onto a school bus would not have placed an undue financial or administrative burden on the [school district], and the Plaintiffs are therefore entitled to relief.' "[71] On appeal, however, the First Circuit held that only the EAHCA, but not Section 504, required the school district to provide Hurry with door-to-door transportation.[72] The appellate court held that the Section 504 regulations referring to the provision of transportation apply only when the recipient of federal assistance refers the child to a *private* program, not where public programs are at issue.[73]

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[67] 697 F.2d at 184. The Seventh Circuit further held that requiring handicapped students to pass the MCT as a prerequisite to obtaining a high school diploma did not violate the EAHCA.

[68] *Id.*

[69] *Id. See also, Anderson v. Banks*, 520 F. Supp. 472 (S.D. Ga. 1981) (school district's requirement that eligibility to receive a high school diploma hinged on obtaining a ninth grade equivalency score on the California Achievement Test (CAT) did not violate Section 504 by discriminating against educable mentally retarded students; students who could not pass the CAT were not otherwise qualified to receive diplomas).

A case in which the court found that testing criteria utilized by a school district *did* violate Section 504 and the EAHCA is *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984) (IQ tests had impermissible disparate impact on black students for purposes of discerning whether students were educable mentally retarded). For a discussion of this case *see* chapter 15 section IV A of this text, *infra* (discussing the EAHCA).

[70] 734 F.2d 879 (1st Cir. 1984).

[71] 734 F.2d at 885.

Another case arising under both Section 504 and the EAHCA is *Martinez v. School Board of Hillsborough County, Florida*.[74] That case involved the appropriate educational placement of a trainable mentally handicapped (TMH) child with AIDS, who was not toilet trained, who suffered from thrush, and who sucked her fingers; the thrush caused blood to be produced in her saliva, and the sucking caused bloody saliva to remain on her fingers. The child's parents sought to place her in a special classroom for TMH children. The school district felt that the appropriate educational placement for the child was homebound instruction. The child's mother requested that the child be provided with numerous "reasonable" accommodations under Section 504 to allow her to attend school.[75] When discussing the interrelationship between Section 504 and EAHCA in the context of a child with an infectious disease, the Eleventh Circuit stated as follows:

> The trial judge must first determine the most appropriate educational placement for the handicapped child under [EAHCA] procedures. Next, the court

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[72] 734 F.2d at 886.

[73] *Id.* (citing 45 C.F.R. §84.33(c)(2)). 45 C.F.R. §84.33(c)(2) (1989) provides:

> *Transportation:* If a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, the recipient shall ensure that adequate transportation to and from the program is provided at no greater cost than would be incurred by the person or his or her parents or guardian if the person were placed in the program operated by the recipient.

Another case discussing 45 C.F.R. §84.33(c) is *Association for Retarded Citizens in Colorado v. Frazier*, 517 F. Supp. 105 (D. Colo. 1981). In that case the Colorado Department of Education argued that because the plaintiffs, mentally retarded school children, were voluntarily placed in private schools, 45 C.F.R. §84.33(c)(4) exempted the Department from paying for the plaintiffs' education. That section provides that if a recipient has made available a FAPE to a handicapped child, but the child's parents choose to place the child in a private school, the recipient is not required to pay for the child's private school education. The court noted that the "provision is triggered only after an appropriate public education . . . is made available by the recipient but is rejected by the parents or guardian who choose instead the private school placement." 517 F. Supp. at 123. Because the defendants had not made available a FAPE to the plaintiffs, the court denied the defendant's motion for summary judgment on that issue.

[74] 861 F.2d 1502 (11th Cir. 1988), 1988-89 EHLR 441:257.

[75] Mrs. Martinez suggested the following accommodations:

> . . . requiring [the child] to maintain a distance from other children; assigning a full-time aide to assist with health precautions; placing [the child] with non-ambulatory TMH students; using disposable diapers and a separate potty chair for toilet training; limiting the number of students in the classroom; and using gloves, disinfectants, and other precautions in handling and disposing of waste materials.

861 F.2d at 1504.

> must determine whether the child is otherwise qualified within the meaning of [S]ection 504 to be educated in this setting, despite the communicable disease . . . [following the standards set forth in *School Board of Nassau County v. Arline*[76]]. If not, the court must consider whether reasonable accommodations could reduce the risk of transmission so as to make the child otherwise qualified to be educated in that setting. In considering accommodations that would make the child "otherwise qualified," the court must bear in mind the requirement that to the maximum extent appropriate, the child is to be educated in the least restrictive environment.[77]

Because the district court failed to follow this procedure, the Eleventh Circuit remanded the case to allow the district court to make the required findings.[78]

4. Rights of Parents Under Section 504

Parents of handicapped children have also utilized Section 504 in actions to preserve their own rights against school districts. In *Rothschild v. Grottenthaler*[79] deaf parents of nondisabled children requested that their children's school district provide them with sign-language interpreters during meetings with teachers and school administrators to discuss their children's programs and at various school functions where parents were asked to participate. When the school district refused, the parents claimed they were being denied equal access to services offered by the school in violation of Section 504. The court agreed. The court held that the school district must provide qualified sign-language interpreters for hearing-impaired parents of district school children at " 'school-initiated conferences incident to the academic and/or disciplinary aspects of their child's education. . . .' "[80] The court further held, however, that the school district did not have to provide an interpreter for the parents when they attended their children's extracurricular activities. The court stated that "[t]o the extent that the parents wish to voluntarily participate in any of the plethora of extra-curricular activities that their children may be involved in, we think they, like other parents, must do so at their own expense."[81]

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[76] 480 U.S. 273, 107 S. Ct. 1123 (1987). For a discussion of those standards *see* chapter 5 of this text, *supra*.

[77] 861 F.2d at 1505-06. For a discussion of the least restrictive environment concept under the EAHCA, *see* chapter 16 of this text, *infra*.

[78] The cases in which the plaintiffs have asserted claims under both the EAHCA and Section 504 are too numerous to list in this text. Two cases that may be of interest, however, are as follows: *Hendricks v. Gilhool*, 709 F. Supp. 1362 (E.D. Pa. 1989) (Pennsylvania Department of Education violated both Acts by: (1) failing to ensure that handicapped students were provided with educational facilities comparable to those enjoyed by non-handicapped students; (2) relocating classroom facilities and thereby requiring handicapped students to ride buses for as long as an hour and three-quarters to and from school; (3) educating handicapped students in unnecessarily restrictive settings; and (4) failing to open enough special education classes to meet the needs of the plaintiffs, thereby denying the plaintiffs a FAPE); *Sanders v. Marquette Public Schools*, 561 F. Supp. 1361, 1371 (W.D. Mich. 1983) (noting that "[w]hen a plaintiff shows that the defendants generally provided special educational programs for the handicapped, and after the plaintiff has shown himself to have been handicapped at the time in question, it may logically be inferred that it would not have imposed an 'undue burden' on the defendants to provide a special education program for the plaintiff," and holding that a learning-disabled student established a *prima facie* case of discrimination under Section 504).

[79] 725 F. Supp. 776 (S.D.N.Y. 1989), 16 EHLR 78, *aff'd in part, vacated in part*, No. 90-7097, slip op. (2d Cir. June 27, 1990) (available on Lexis genfed library).

B. Postsecondary Education

Generally, a college or university that receives federal financial assistance "may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity."[82] More specifically, Section 504 claims are most likely to be raised in three situations involving postsecondary education: (1) those involving admission to a college or university; (2) those involving the provision of reasonable accommodations for disabled college students; and (3) those involving access to non-academic programs and services at a college or university.

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[80] 725 F. Supp. at 779-80. In so ruling, the court relied on several decisions issued by the Office for Civil Rights (OCR) of the United States Department of Education. *E.g.*, No. 02-89-1-54, *Sherburne-Earville School District;* No. 09-84-1102, *Newark Unified School District;* Opinion Letter of the OCR published at EHLR 305:48-49 (June 11, 1988). *See also, Ramapo (NY) Central School District*, 16 EHLR 559 (OCR November 29, 1989) (school district must provide hearing-impaired parents of a non-handicapped student with qualified sign-language interpreters during school events and meetings).

[81] 725 F. Supp. at 780. While affirming the major portion of the district court's opinion, however, the Second Circuit vacated that part of the court's order that would have required the school district to provide an interpreter for the parents to attend their child's graduation, since "[g]raduation does not seem directly related to a child's academic and/or disciplinary progress. . . ." No. 90-7097, slip op. at 21 (2d Cir. June 27, 1990) (available on Lexis genfed library). The DOE's OCR, however, has opined that:

> Graduation programs, school plays and other non-academic programs conducted after school hours are part of the program offerings of the school district. Therefore school districts are responsible [under Section 504] for providing interpretive services or alternate means of rendering these activities accessible to hearing-impaired parents of nonhandicapped beneficiaries.

OCR Section 504 Letter of June 11, 1988, by Louis O. Bryson, Sr., Director, Postsecondary Education Division, 1988-89 EHLR 305:48-49. That opinion letter further stated that "handicapped parents of nonhandicapped students are considered beneficiaries of nonacademic services under Section 504." *See also*, OCR Staff Memorandum of December 20, 1989 from William F. Smith, Acting Assistant Director for Civil Rights, 16 EHLR 542 (noting that a hearing-impaired parent of a non-handicapped student attending a public school is a "qualified handicapped" person entitled to the protection of Section 504).

[82] 34 C.F.R. §104.43(c) (1989).

1. Admissions

In the admissions context, the DOE regulations provide that [q]ualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination . . . ."[83] To assist in preventing such discrimination, the regulations specifically provide that:

(i) A college or university may not make pre-admission inquiries as to whether an applicant for admission is disabled, but, after admission, may make inquiries on a confidential basis about handicaps that may require accommodation.[84] Exceptions to this rule are made where "a recipient is taking remedial action to correct the effects of past discrimination . . ." or where "a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity. . . ."[85] Even in the latter situations, however, the recipient must clearly state: (a) "that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary action efforts"; and (b) "that the information is being requested on a voluntary basis, that it will be kept confidential, [and] that refusal to provide it will not subject the applicant to any adverse treatment. . . ."[86] Of course, colleges and universities cannot limit the number of handicapped persons that may be admitted to its program.[87]

(ii) A college or university may "not make use of any test or criterion for admission that has a disproportionate, adverse effect" on handicapped applicants, unless the test or criterion has been validated as a predictor of success in the program and alternative tests or criteria that have a less disproportionate adverse effect are not available.[88] Admissions tests must be selected and administered so as to ensure that, when a test is administered to an applicant who has impaired sensory, manual or speaking skills, the test does not reflect those impaired skills, but actually measures the applicant's aptitude or achievement level.[89]

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[83] 34 C.F.R. §104.42(a) (1989).

[84] 34 C.F.R. §104.42(b)(4) (1989) (a recipient college or university "may not make preadmission inquiry as to whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation").

To assist in enforcing the prohibition against pre-admission (and pre-employment — *see* section III of this chapter, *infra*) inquiries regarding handicapped applicants, the DOE's OCR has opined that school districts should *not* indicate on secondary school transcripts sent to a postsecondary institution that a student was enrolled in a special education program. OCR opined that indicating on a student's transcript that the student attended special education classes might have "the effect of subjecting handicapped students to pre-employment or preadmission disclosure of information regarding whether they are handicapped." OCR Section 504 Letter of October 17, 1988, by Harry A. Orris, Director, Elementary and Secondary Education Division (Cleveland), EHLR Supp. 243 (June 14, 1989), 305:49-50.

[85] 34 C.F.R. §104.42(c) (1989).

[86] 34 C.F.R. §104.42(c)(2) (1989).

[87] 34 C.F.R. §104.42(b)(1) (1989).

[88] 34 C.F.R. §104.42(b)(2) (1989) (a recipient college or university "[m]ay not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless (i) the test or criterion, as used by the recipient, has been validated

Several courts have dealt with cases involving alleged discrimination in admission to postsecondary educational programs. The leading case on this subject is *Southeastern Community College v. Davis*.[90] In that case, the Supreme Court held that a nursing school did not discriminate against a hearing-impaired applicant when it refused to admit the applicant to its program. The Court held that Davis was not otherwise qualified for the nursing program because "nothing less than close, individual attention by a nursing instructor would be sufficient to ensure patient safety if [Davis] took part in the clinical portion of the nursing program."[91] The Court concluded that because Davis could not function in clinical courses without close supervision, the nursing school could only allow her to take academic courses. The Court held:

> Whatever benefits [Davis] might realize from such a course of study, she would not receive even a rough equivalent of the training a nursing program normally gives. Such a fundamental alteration in the nature of a program is far more than the "modification" [Section 504] requires.[92]

In *Davis* the Court relied in part on a DHHS Section 504 regulation providing that, with respect to postsecondary and vocational education services, a "qualified handicapped person" is one "who meets the academic and technical standards requisite to admission or participation in the [school's] education program or

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as a predictor of success in the education program or activity in question and (ii) alternate tests or criteria that have a less disproportionate, adverse effect are not shown by the Assistant Secretary [of Education] to be available").

[89] 34 C.F.R. §104.42(b)(3) (1989) provides that a recipient college or university:

> [s]hall assure itself that (i) admissions tests are selected and administered so as best to ensure that, when a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure); (ii) admissions tests that are designed for persons with impaired sensory, manual or speaking skills are offered as often and in as timely a manner as are other admissions tests; and (iii) admissions tests are administered in facilities that, on the whole, are accessible to handicapped persons . . . .

[90] 442 U.S. 397, 99 S. Ct. 2361 (1979). For a discussion of this case, *see* chapter 5 of this text, *supra*.

[91] 442 U.S. at 409, 99 S. Ct. at 2368-69.

[92] *Id.*

activity. . . ."[93] The Court cited an explanatory note to that regulation providing that "[t]he term 'technical standards' refers to *all* nonacademic admissions criteria that are essential to participation in the program in question,"[94] and explained that "[a] further note emphasizes that legitimate physical qualifications may be essential to participation in particular programs."[95] The Court held, therefore, that the DHHS regulations interpret the " 'other' qualifications which a handicapped person may be required to meet as including necessary physical qualifications."[96]

In *Doe v. New York University*[97] the court was also concerned with safety. In that case, the Second Circuit held that a medical school did not discriminate against an applicant with a history of mental illness when it refused to re-admit the applicant to its program.[98] The court held that the applicable question in determining whether Doe was otherwise qualified to be re-admitted to medical school was "the substantiality of the risk that her mental disturbances [would] recur, resulting in behavior harmful to herself and others."[99] The Second Circuit rejected the district court's test that Doe must be found qualified if it appeared "more likely than not" that she could complete her medical training and serve as a doctor without a recurrence of her self-destructive and antisocial behavior. The appellate court reasoned that Congress would not have intended to force colleges to accept students who pose a significant risk of harm to themselves or others even if the chances of harm were less than 50 percent.

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[93] 45 C.F.R. §84.3 (k)(3)(1978). When *Davis* was decided, the DHHS was the Department of Health, Education and Welfare (HEW), and thus the regulation was an HEW regulation. [Cited at 442 U.S. at 406.]

[94] 45 C.F.R. Part 84 App. A 405 (1978) (emphasis added). [Cited at 442 U.S. at 406.]

[95] 442 U.S. at 407, 99 S. Ct. at 2367. The Court referred to 45 C.F.R. Part 84 App. A 405 (1978) which provided as follows:

> Paragraph (k) of §84.3 defines the term "qualified handicapped person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

[96] 442 U.S. at 407, 99 S. Ct. at 2367. A case reaching similar reasoning is *Doherty v. Southern College of Optometry*, 862 F.2d 570 (6th Cir. 1988). In that case the Sixth Circuit held that a student with an eye disease that prevented him from performing certain clinical requirements of the optometry program was not otherwise qualified for the program.

[97] 666 F.2d 761 (2d Cir. 1981).

[98] *Doe v. New York University* was decided in the context of a motion for a preliminary injunction. Thus, the Second Circuit held that it was unlikely that Doe would succeed on the merits of her claim.

[99] 666 F.2d at 777.

Another case in which the plaintiff was held not otherwise qualified for re-admission to a postsecondary educational program is *Anderson v. University of Wisconsin*.[100] In that case an alcoholic was denied readmittance to law school. The plaintiff contended that although his grade point average was below the school's required 77, "but for his drinking he could achieve an average of 77. . . ."[101] The court held that plaintiff's argument "misse[d] the point."[102] The court noted that, under *Davis*, Section 504 "forbids discrimination based on stereotypes about a handicap, but it does not forbid decisions based on actual attributes of the handicap."[103] Thus, the court held that "[a] student who cannot maintain an average of 77 at the Law School is not qualified to remain as a student, *unless* the student shows that the source of the academic problem has been abated, making future work of satisfactory quality likely."[104] In this case, it was "undisputed that Anderson sometimes still [drank]."[105] Since the university's decision was not based on stereotypes about alcoholism, but on "honest judgments about how [the plaintiff] had performed in fact and could be expected to perform," no discrimination had occurred.[106]

To the converse, in *Pushkin v. Regents of the University of Colorado*,[107] a case involving initial admission — rather than re-admission — to a postsecondary education program, the Tenth Circuit held that a medical school had impermissibly refused to admit an applicant with multiple sclerosis to its psychiatric residency program based on incorrect assumptions about multiple sclerosis in general and inadequate factual grounds about the effects of multiple sclerosis on the individual plaintiff. The members of the admissions committee claimed that due to his multiple sclerosis, which caused Dr. Pushkin to be confined to a wheelchair and to be disabled in his abilities to walk and write, Dr. Pushkin would be unable to withstand the stress of the residency program. The committee also claimed that Dr. Pushkin's multiple sclerosis would have a detrimental psychological effect on his patients. Dr. Pushkin's long-time counselor, however, testified that after four years of observing Dr. Pushkin he did not agree with the committee's assumptions. The court concluded, therefore, that the committee's reasons for rejecting Dr. Pushkin were "based on misconceptions or unfounded factual conclusions, and that reasons articulated for the rejection other than the handicap encompass[ed] unjustified consideration of the handicap itself."[108]

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[100] 841 F.2d 737 (7th Cir. 1988).

[101] 841 F.2d at 740.

[102] *Id.*

[103] *Id.*

[104] *Id.* (emphasis in original).

[105] 841 F.2d at 741.

[106] *Id. Doe* and *Anderson* both dealt with the issue of *readmission* to postsecondary educational programs. The failure of disabled plaintiffs to complete their programs the first time may lend weight to the argument that they were not otherwise qualified for those programs. *See also, Bradford v. University of Maryland School of Medicine*, No. 83-1679, slip op. (4th Cir., May 4, 1984) (unpublished) (medical school did not violate Section 504 when it refused to readmit a learning-disabled student after the student declined the school's offer to allow her to retake her first-year courses).

[107] 658 F.2d 1372 (10th Cir. 1981).

2. Reasonable Accommodations

The DOE regulations suggest three types of accommodations that may be made to assist a handicapped student in obtaining a postsecondary education: academic adjustments, modification or alteration of course examinations, and the provision of auxiliary aids.[109]

(i) With respect to academic adjustments, the regulations provide that a recipient college or university:

> shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.[110]

(ii) With respect to modification or alteration of course examinations the regulations provide that a recipient college or university:

> shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represent the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).[111]

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[108] 658 F.2d at 1387.

[109] 34 C.F.R. §104.44 (1989).

[110] 34 C.F.R. §104.44(a). Subpart (b) of that section provides that a recipient college or university "may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity."

[111] 34 C.F.R. §104.44(c) (1989).

(iii) The regulations suggest that recipient colleges and universities utilize auxiliary aids to ensure that students with impaired sensory, manual or speaking skills are not subject to discrimination in postsecondary educational programs.[112] Specifically, the regulations state that:

> Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.[113]

Notwithstanding these broad regulations, disputes frequently arise with respect to the provision of reasonable accommodations for disabled college students. A prominent dispute involves the provision of interpreters and/or note-takers for hearing-impaired students. A case on point is *Camenisch v. University of Texas*,[114] which involved a deaf graduate student who sought to compel the university to provide him with a sign-language interpreter for his classes. The Fifth Circuit affirmed the lower court's grant of a preliminary injunction in Camenisch's favor, ordering the university to procure and compensate a qualified interpreter to assist Camenisch in his classes. Subsequently, since Camenisch had graduated prior to the time his case was heard by the Fifth Circuit, the Supreme Court vacated the Fifth Circuit's opinion on grounds of mootness.[115]

More recently, in *Prince v. Rutgers, The State University School of Law — Camden*[116] a deaf law student complained that Rutgers Law School failed to provide her with *both* qualified sign-language interpreters *and* qualified note-takers for her law school classes. The plaintiff sought to enjoin the law school from holding classes in the courses the plaintiff was taking until such time as the school provided her with qualified note-takers in addition to qualified sign-language interpreters. The district court agreed that the school had violated Section 504, and granted a temporary restraining order barring the school from holding classes in two courses for the remainder of the semester unless the school recorded the lectures and provided next-day transcripts to the plaintiff.[117]

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[112] 34 C.F.R. §104.44(d)(1) (1989).

[113] 34 C.F.R. §104.44(d)(2) (1989).

[114] 616 F.2d 127 (5th Cir., 1980), *vacated as moot*, 451 U.S. 390 (1981).

[115] Courts are required to hear cases that constitute a "live" controversy. A case is declared "moot" when the disposition of the case would no longer affect the litigant's rights. *Webster v. Reproductive Health Services*, ______ U.S. ______, 109 S. Ct. 3040, 3053 (1989) (decision by plaintiffs to withdraw request for declaration of statute's constitutionality because the statute did not adversely affect them rendered appeal of that issue moot); *Richmond v. J.A. Croson Co.*, ______ U.S. ______, 109 S. Ct. 706, 713 (1989) (fact that ordinance at issue had expired did not render a claim moot, because the issue of whether the city's refusal to award a contract under a minority set-aside plan was lawful was determinative of the live issue of whether plaintiff could recover damages).

[116] Civ. Act. No. 89-4740 (SSB) (D.N.J., complaint filed November 14, 1989).

Another dispute involves the extent to which colleges or universities must accommodate disabled students by modifying or changing the form of examinations. In *Wynne v. Tufts University School of Medicine*,[118] for example, Wynne was a dyslexic student who was dismissed from medical school after failing several courses during two attempts to complete the first-year program. Wynne claimed that the medical school was obligated under Section 504 to alter the examinations given him to accommodate his cognitive difficulties. Specifically, Wynne requested that the school test him by means other than written multiple-choice questions, such as by oral or essay examinations. The district court granted summary judgment in favor of the school, on the ground that Wynne was not otherwise qualified for the medical school program since he was not able to meet the school's requirements. On appeal, the Fifth Circuit reversed. The circuit court held that a triable issue of fact existed with respect to the question of whether the school could reasonably accommodate Wynne. After noting that Wynne scored much higher scores on "practicum" examinations, the Fifth Circuit stated:

> Tufts has offered no evidence explaining why multiple-choice examinations, as distinguished from all other written examinations, test a student's ability to "assimilate, interpret and analyze complex written material." In particular, we find it hard to understand why essay examinations would not meet the same objective.[119]

In rejecting the school's contention that this case was similar to *Southeastern Community College v. Davis*[120] and *Doherty v. Southern College of Optometry*,[121] the circuit court noted that in the latter cases the handicaps of the plaintiffs "prevented them from performing hands-on, technical aspects of the degree programs."[122] In *Wynne*, to the converse, "the alleged discrimination stem[med] not from the particular skill required — the ability to work with complex data — but from the method by which Tufts measures that ability."[123] The Fifth Circuit concluded that the evidence was insufficient to find as a matter of law that "changing the testing method would result in a 'fundamental alteration' " of the medical school's program.[124]

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[117] *Id.*, Order of November 27, 1989.

[118] No. 89-1670, slip op. (5th Cir. April 30, 1990) (available on Lexis genfed library).

[119] Slip op. at 17-18.

[120] *See* text at notes 90-96 of this chapter, *supra*.

[121] *See* note 96 of this chapter, *supra*.

[122] Slip op. at 19.

[123] *Id.*

[124] *Id.*

In some cases a dispute may arise over the question of who must pay for the accommodations provided a handicapped college student. If vocational rehabilitation services are available to the student under Title I of the Rehabilitation Act,[125] it may be held that the state Department of Rehabilitation, rather than the college or university, is required to pay for the accommodations.[126] Where funds are not available from the state Department of Rehabilitation, however, and the college is required to provide interpreting services, it has been held that a university may not deny the provision of auxiliary aids for disabled students — including interpreters for hearing-impaired students — based on their ability to pay or their enrollment in specific programs. In *United States v. Board of Trustees of the University of Alabama*[127] the court held that requiring hearing-impaired students to show that they lacked the financial means to pay for their own interpreters violated Section 504.

3. Non-Academic Programs and Services

In the context of access to non-academic programs and services, several DOE regulations are significant:

(i) The DOE regulations expressly provide that

> [n]o qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education program or activity. . . .[128]

(ii) With respect to housing, the DOE regulations provide that a recipient college or university "that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to others. . . ."[129]

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[125] 29 U.S.C.A. §720(a) (1985 and West Supp. 1990) (authorizing federal grants to help states meet current and future needs of handicapped individuals).

[126] *See, e.g., Schornstein v. New Jersey Division of Vocational Rehabilitation Services*, 519 F. Supp. 773 (D.N.J. 1981), *aff'd*, 688 F.2d 824 (3d Cir. 1982), and *Jones v. Illinois Department of Rehabilitation Services*, 504 F. Supp. 1244 (N.D. Ill. 1981), *aff'd*, 689 F.2d 724 (7th Cir. 1982) (holding that state Departments of Rehabilitation were required by Title I of the Rehabilitation Act to pay for interpreters for deaf students).

[127] No. 86-C-1779-S, slip op. (N.D. Ala. December 30, 1988).

[128] 34 C.F.R. §104.43(a) (1989).

[129] 34 C.F.R. §104.45(a) (1989). Subsection (a) continues by providing that, following a six-month allowable transition plan pursuant to 34 C.F.R. §104.45(a) "such housing shall be available in sufficient

(iii) With respect to physical education and athletics, the DOE regulations provide that a "recipient that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities."[130] The DOE regulations require that a recipient college or university "shall operate its programs and activities in the most integrated setting appropriate."[131] Therefore, the regulations provide that physical education and athletic activities that are separate or different may be offered to handicapped students only if separation or differentiation is consistent with that requirement, and "only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different."[132]

(iv) With respect to counseling and placement services, the DOE regulations provide that "personal, academic, or vocational counseling, guidance, or placement services. . ." must be provided to handicapped students to the same extent that such services are provided to non-handicapped students.[133] Further, a recipient college or university "shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are non-handicapped students with similar interests and abilities."[134]

(v) With respect to social organizations, the DOE regulations provide that a recipient college or university that "provides significant assistance to fraternities, sororities, or similar organizations shall assure itself that the membership practices of such organizations do not permit discrimination [on the basis of handicap]."[135]

(vi) With respect to financial assistance, the DOE regulations prohibit a recipient college or university from providing less assistance to handicapped students than to non-handicapped students, limiting the eligibility of non-handi-

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quantity and variety so that the scope of handicapped students' choice of living accommodations is, as a whole, comparable to that of non-handicapped students." Subpart (b) of §104.45 further provides:

> A recipient that assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to assure itself that such housing is, as a whole, made available in a manner that does not result in discrimination on the basis of handicap.

[130] 34 C.F.R. §104.47(a) (1989).

[131] 34 C.F.R. §104.43(d) (1989).

[132] 34 C.F.R. §104.47(a)(2) (1989).

[133] 34 C.F.R. §104.47(b) (1989).

[134] *Id.* That regulation continues by providing that "[t]his requirement does not preclude a recipient from providing factual information about licensing and certification requirements that may present obstacles to handicapped persons in their pursuit of particular careers."

[135] 34 C.F.R. §104.47(c) (1989).

capped students to such assistance, or otherwise discriminating on the basis of handicap.[136]

(vii) With respect to employment assistance, the DOE regulations provide that a recipient college or university that "assists any agency, organization, or person in providing employment opportunities to any of its students shall assure itself that such employment opportunities, as a whole, are made available in a manner [that does not discriminate against handicapped students]."[137] Similarly, a recipient college or university that employs any of its students may not do so in a manner that discriminates against handicapped students.[138]

Courts are sometimes called upon to resolve disputes pertaining to these provisions. An illustrative case deals with the issue of university housing. In *Fleming v. New York University*[139] a wheelchair-bound graduate student at NYU requested single occupancy of a double room in university undergraduate housing to accommodate his wheelchair. NYU's policy required all students residing alone in double rooms to pay double housing fees. When students lived alone in double rooms due to low occupancy rates, rather than due to special requests, they were not charged a double rate. Fleming claimed that NYU violated Section 504 when it charged him a double rate for his single occupancy of a double room. The district court disagreed, on the ground that Fleming had asked for a double room in an undergraduate dormitory even though accessible graduate housing was available, and the Second Circuit affirmed.[140]

Another illustrative case involves access to athletics. In *Wright v. Columbia University*[141] a college student who was blind in one eye alleged that the university violated Section 504 when it refused to allow him to participate in the school's intercollegiate football program. The court granted a temporary restraining order in the student's favor based in part on evidence that the student had "seriously considered and appreciate[d] the risks incident to playing football with impaired vision and willingly accept[ed] them."[142]

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[136] 34 C.F.R. §104.46(a)(1) and (2) (1989) provide:

> (1) In providing financial assistance to qualified handicapped persons, a recipient to which this subpart applies may not (i), on the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate, or (ii) assist any entity or person that provides assistance to any of the recipient's students in a manner that discriminates against qualified handicapped persons on the basis of handicap.
>
> (2) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established under wills, trusts, bequests, or similar legal instruments that require awards to be made on the basis of factors that discriminate or have the effect of discriminating on the basis of handicap only if the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap.

[137] 34 C.F.R. §104.46(b) (1989).

[138] 34 C.F.R. §104.46(c) (1989).

[139] 865 F.2d 478 (2d Cir. 1989).

[140] 865 F.2d at 482.

[141] 520 F. Supp. 789 (E.D. Pa. 1981).

III. Special Issues Relating to Employment

The regulations promulgated pursuant to Section 504 also deal with specific employment issues (in addition to the provision of "reasonable accommodations" for "otherwise qualified" handicapped employees). Significant issues include the following:

A. Employment Criteria

The DHHS and Department of Labor (DOL) regulations provide that recipients of federal financial assistance may not utilize employment tests or selection criteria that tend to screen out all handicapped people, or a class of handicapped people, unless the criteria is job related for the position in question and alternative criteria are not available.[143] Further, the DHHS regulations provide that recipients must utilize employment tests that best ensure that

> when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).[144]

At least one court has considered the question of whether a particular employment test violated Section 504. In *Stutts v. Freeman*[145] a dyslexic job applicant was denied the job of heavy equipment operator because he could not pass a written test required by the employer for admission to a training program that constituted a prerequisite for the job. The court reasoned that because the written test had a disparate impact on dyslexic persons, it must be determined whether the test was a necessary criterion for the heavy equipment operator job. If so, the question to be answered was whether a reasonable accommodation (such as, application of alternate criteria, for example) could render a dyslexic person eligible for the employment. In ruling that the employer violated Section 504 when requiring the dyslexic job applicant to take the written test, the Eleventh Circuit noted as follows:

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[142] 520 F.2d at 793. The court also noted that the student "offered proof through a highly qualified ophthalmologist that no substantial risk of serious eye injury related to football exists." *Id.*

[143] 45 C.F.R. §84.13(a) (1989) (DHHS regulation); 29 C.F.R. §32.14(a) (1989) (DOL regulation).

[144] 45 C.F.R. §84.13(b) (1989). The DOL regulations further provide:

> Whenever a recipient applies job qualifications in the selection of applicants, employees or participants for employment or training or other change in employment status such as promotion, demotion or training, which would tend to exclude handicapped individuals because of their handicap, the qualifications shall be related to the specific job or jobs for which the individual is being considered and shall be consistent with business necessity and safe performance. The recipient shall have the burden to demonstrate that it has complied with the requirements of this paragraph.

29 C.F.R. §32.14(b) (1989).

[145] 694 F.2d 666 (11th Cir. 1983).

> . . . everyone involved in this case seems to concede that Mr. Stutts would have no problems doing the job but rather may experience difficulty with the outside reading requirements of the training program. If selected, this obstacle may be overcome by Mr. Stutts obtaining the assistance of someone to act as a "reader." [By] eliminat[ing] Mr. Stutts without implementing an alternative test (oral) administered by outside professionals or [the employer's] staff or by failing to "adjust" the entry requirements to accommodate his dyslexia, [the employer] has failed to comply with [Section 504].[146]

Stutts v. Freeman is illustrative of situations in which job selection criteria are not both job related *and* the only criteria available to evaluate an applicant's ability to perform the job. Such criteria are required to meet *both* tests.

B. Pre-Employment Inquiries

The DHHS and DOL Section 504 regulations also prohibit recipients of federal financial assistance from conducting pre-employment medical examinations or making pre-employment inquiries about an applicant's possible handicap except: (1) when the recipient is taking remedial action to correct the effects of past discrimination, or (2) when the recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation by handicapped persons in its federally assisted program or activity.[147] Even in the exempted situations, the recipient must make it clear that the information requested will be used solely in connection with its remedial action obligations or voluntary affirmative action plan, and must plainly state that the information is being requested on a voluntary

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[146] 694 F.2d at 669 n.3.

[147] 45 C.F.R. §84.14 (1989) (DHHS regulation); 29 C.F.R. §32.15 (1989) (DOL regulation).

In *Doe v. Syracuse School District*, 508 F. Supp. 333 (N.D.N.Y. 1981), a school district required an applicant for a teaching-assistant position to complete a vital statistics form asking whether he had ever experienced or been treated for any "migraine, neuralgia, nervous breakdown, or psychiatric treatment." The applicant acknowledged that he had suffered a nervous breakdown. Although the school district's psychiatrist found the applicant to be physically and mentally qualified for the position, his application was rejected. The court found that the school district's pre-employment inquiries basis and that refusal to provide the information will not result in adverse treatment.[148]

The regulations expressly provide that recipients *may* make pre-employment inquiries into an applicant's ability to perform job-related functions, however.[149] Further, the regulations permit recipients to condition an offer of employment on the results of a pre-employment medical examination that is required of *all* entering employees, regardless of handicap.[150]

C. Additional Issues

Other issues uniquely relating to employment, but not specifically covered by the regulations, have arisen in cases filed under Section 504:

1. Duty To Investigate

At least two courts have addressed the question of whether an employer has a duty under Section 504 to inquire into the accuracy of medical statements regarding the scope or extent of an employee's handicap. In *Walker v. Attorney General of the United States*[151] an FBI employee suffered chest pains while at work. A cardiologist who admitted the plaintiff to a hospital for five days wrote the plaintiff's supervisor that the plaintiff had a cardiac condition with "moderately severe angina attacks," that the plaintiff should not be required to work nights, and that when performing strenuous labor the plaintiff should be allowed to rest when tired.[152] After the plaintiff experienced further difficulties, the cardiologist informed the plaintiff's supervisor that the plaintiff had "severe coronary artery disease" and should be moved to a "desk position without any stress."[153] The FBI sent the plaintiff for a second medical opinion, and that examining physician confirmed the diagnosis of coronary artery disease. The plaintiff was assigned to a desk position but was discharged for medical disability after failing tests for clerical positions. Prior to the plaintiff's termination his doctor determined that his

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violated 45 C.F.R. §84.14. The school district admitted that a history of treatment for mental or emotional problems is not relevant to a determination of an applicant's present fitness for a particular position. Thus, the court stated that while the school district could have asked "whether the applicant was capable of dealing with various emotionally demanding situations," the question that was asked violated "both the letter and spirit of Section 84.14." 508 F. Supp. at 337.

[148] *Id.*

[149] 45 C.F.R. §84.14(a) (1989) (DHHS regulation); 29 C.F.R. §32.15(a) (1989) (DOL regulation).

[150] 45 C.F.R. §84.14(c) (1989) (DHHS regulation); 29 C.F.R. §32.15(c) (1989) (DOL regulation).

[151] 572 F. Supp. 100 (D.D.C. 1983).

[152] 572 F. Supp. at 101.

[153] *Id.*

medical condition was not as severe as the doctor had initially stated, but the doctor failed to communicate that information to the FBI. When informed, the FBI failed to reinstate the plaintiff, and he filed suit under Section 504. The court held that:

> . . . the FBI was reasonable in concluding that the plaintiff was not qualified for his position. Whatever duty the agency may have had to inquire into the accuracy of the plaintiff's doctor's diagnosis (*and the [c]ourt makes no finding that such duty necessarily exists*), it was more than adequately complied with by referring the plaintiff . . . [for further medical examination] that confirmed that diagnosis. [The FBI's] decision to fire the plaintiff was therefore justified, and cannot be challenged under the Rehabilitation Act.[154]

The court in *Walker* relied in part on the court's ruling in *Cook v. United States Department of Labor.*[155] In that case the plaintiff was fired after his cardiologist told his employer that the plaintiff might have angina pectoris. Consequently, the employer sought to transfer the plaintiff to a less strenuous position. The plaintiff refused the transfer and was fired. In ruling on the plaintiff's action for reinstatement pursuant to Section 504, the Ninth Circuit stated:

> We need not decide at this time what burden an employer bears when the existence or consequence of a handicap is disputed. In this case, [plaintiff] informed [his employer] that his doctor said he might have angina, and his records reflected angina. Faced with this substantial and uncontradicted evidence, the [employer] had no duty to investigate further.[156]

2. Reassignment to Another Position

Another issue of conflict under Section 504 involves the question of reassignment. If an employee is found to have a handicap that precludes him from performing the duties of his present job, does his employer (a recipient of federal financial assistance) have a duty under Section 504 to reassign the employee to another position within the company that the employee is capable of performing? In addressing this question in *School Board of Nassau County v. Arline,*[157] the Supreme Court stated that while employers "are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities *reasonably available under the employer's existing policies*."[158] In so ruling the Court referred to the DHHS Section 504 regulation providing that "reasonable accommodations" include such provisions as "job-restructuring," but noting that the suggested accommodations are not all-inclusive.[159] The answer to the subject question, therefore, will apparently hinge upon whether an employer has existing policies that would allow the transfer of the employee to another position within the company. If, for example, the employee sought a transfer to another position that required stated seniority under the employer's existing policies, the employee would not be entitled to the transfer unless he or she satisfied the seniority requirements.[160]

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[154] 572 F. Supp. at 102 (emphasis added).

[155] 688 F.2d 669 (9th Cir. 1982), *cert. denied*, 464 U.S. 832 (1983).

[156] 688 F.2d at 671.

[157] 480 U.S. 273, 107 S. Ct. 1123 (1987).

[158] 480 U.S. at 289 n.19, 107 S. Ct. at 1131 n.19 (emphasis added)

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[159] 45 C.F.R. §84.12(b) and Part 84 App. P 350 (1989).

[160] *See, e.g., Smith v. Southeastern Pennsylvania Transportation Authority*, No. Civ. Act. 84-4942, slip op. (E.D. Pa. June 26, 1987) (available on Lexis genfed library) (when plaintiff's epilepsy prevented him from performing his job as a trolley car operator, his employer was not required under Section 504 to disturb "established policy" for reassigning employees, particularly "where the employer's existing policy was negotiated with the handicapped employees' union and set out in a collective bargaining agreement").

7

Section 504: Access to Services

I. Introduction

Section 504 prohibits discrimination solely on the basis of handicap by recipients of federal financial assistance that provide benefits or services—such as health services, housing services, rehabilitation services or any other social service — to members of the public. The regulations promulgated pursuant to Section 504 by the Department of Health and Human Services (DHHS) state that when "providing health, welfare, or other social services or benefits," a recipient of federal financial assistance may not: (1) deny such benefits or services to qualified individuals with handicaps; (2) provide qualified individuals with handicaps with benefits or services that are "not equal to" those offered to non-handicapped persons or are not "as effective" as the benefits or services provided others; (3) provide benefits or services in a manner that has the effect of limiting the participation of qualified individuals with handicaps; or (4) provide different or separate benefits or services to individuals with handicaps unless it is necessary to do so to provide services or benefits that "are as effective as those provided to others."[1]

There has been a considerable amount of litigation involving Section 504 in the context of access to services. The bulk of that litigation deals with the provision of health services and the provision of services to individuals who are mentally retarded or mentally ill. This chapter will discuss each of those issues separately. In addition, this chapter will address: (1) miscellaneous cases dealing with the right of persons with disabilities to obtain access to other services under Section 504, and (2) two issues relating to deaf persons that have received a modicum of attention:

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[1] 45 C.F.R. §84.52(a)(1)-(5) (1989).

the rights—or alleged rights— of deaf persons to serve as jurors and to have access to television broadcasting. Finally, this chapter will consider whether Section 504 gives handicapped persons a claim for discrimination vis-à-vis *other* handicapped persons, as opposed to vis-à-vis non-handicapped persons.

II. Access to Health Services

A leading case dealing with Section 504 and access to services is *Alexander v. Choate*.[2] In that case, the plaintiffs claimed that Tennessee's reduction—from 20 to 14—in the number of days per year that state Medicaid would pay for in-patient hospital care on behalf of a Medicaid recipient violated Section 504. The gravamen of the plaintiffs' complaint was that handicapped Medicaid recipients require more than that new maximum approximately three times as often as non-handicapped Medicaid recipients, and thus the change from 20 to 14 days of coverage would have an impermissibly disproportionate effect on individuals with handicaps. Although the Supreme Court noted that discriminatory intent should not be a necessary element of a Section 504 claim, since "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent,"[3] the Court held that no violation of Section 504 had occurred.

The Court noted first that Section 504 could not reach *every* action disparately affecting handicapped people, since such an interpretation

> would in essence require each recipient of federal funds first to evaluate the effect on the handicapped of every proposed action that might touch the interests of the handicapped, and then to consider alternatives for achieving the same objectives with less severe disadvantage to the handicapped. The formalization and policing of this process could lead to a wholly unwieldy administrative and adjudicative burden.[4]

Second, the Court held that the appropriate question when determining whether an action has an impermissibly disparate impact upon people with handicaps is whether the action denies such persons "meaningful access to the benefit that the grantee offers."[5] The Court held that the 14-day limitation would not deny the plaintiffs meaningful access to Tennessee's Medicaid services. The Court found that "the reduction, neutral on its face, does not distinguish between those whose coverage will be reduced and those whose coverage will not on the basis of any test, judgment, or trait that the handicapped as a class are less capable of meeting or less likely of having."[6] With respect to the plaintiffs' argument that people with disabilities have a greater need for prolonged in-patient medical care, the Court held:

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[2] 469 U.S. 287, 105 S. Ct. 712 (1985).

[3] 469 U.S. at 296-97, 105 S. Ct. at 717.

[4] 469 U.S. at 298, 105 S. Ct. at 719.

[5] 469 U.S. at 301, 105 S. Ct. at 720.

> Medicaid programs do not guarantee that each recipient will receive that level of health care precisely tailored to his or her particular needs. Instead, the benefit provided through Medicaid is a particular package of health care services, such as 14 days of inpatient coverage. That package of services has the general aim of assuring that individuals will receive necessary medical care, but the benefit provided remains the individual services offered—not "adequate health care."[7]

Finally, the Court held in *Alexander v. Choate* that "Section 504 seeks to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance. . . . The Act does not, however, guarantee the handicapped equal results from the provision of state Medicaid, even assuming some measure of equality of health could be constructed."[8] In so ruling, the Court cited the DHHS regulations requiring the provision of "equally effective services" to handicapped persons.[9] The regulations provide, however, that to be "equally effective," services "are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement. . . ."[10] According to the Court, this regulation, "while indicating that adjustments to existing programs are contemplated, also makes clear that Tennessee is not required to assure that its handicapped Medicaid users will be as healthy as its nonhandicapped users."[11] The Court held that since handicapped Medicaid users had "meaningful and equal access" to Medicaid services, Section 504 had not been violated.[12]

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[6] 469 U.S. at 302, 105 S. Ct. at 720-21.

[7] 469 U.S. at 303, 105 S. Ct. at 721.

[8] 469 U.S. at 304, 104 S. Ct. at 721-22.

[9] *See* generally, the text at note 1 of this chapter, *supra*. Specifically, 45 C.F.R. §84.52(a)(3) (1989) provides that recipients of federal financial assistance that provide health services cannot "[p]rovide a qualified handicapped person with benefits or services that are not as effective . . . as the benefits or services provided to others." 45 C.F.R. §84.4(b)(4)(ii) (1989) provides that recipients of federal financial assistance may not adopt "criteria or methods of administration that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to the handicapped. . . ."

[10] 45 C.F.R. §84.4(b)(2) (1989).

[11] 469 U.S. at 305-06, 105 S. Ct. at 722.

[12] 469 U.S. at 306, 105 S. Ct. at 722.

Lower courts have also considered claims in which handicapped plaintiffs alleged that they were denied equally effective health services. In *Miller v. Woods*,[13] for example, a California Department of Social Services regulation denied payment to housemates of totally disabled people for the provision of protective supervision services. Under the state regulation, an otherwise eligible recipient of services who required protective supervision was deemed to be not legally in need of such services if he or she had a housemate capable of providing supervision. In this case the court held that the California regulation *did* violate the Section 504 requirement that "equally effective services" be provided to persons with handicaps by a recipient of federal financial assistance.[14] The court stated:

> Enforcement of the challenged regulation denies concededly handicapped individuals necessary assistance while granting it to others who do not have providers living with them. . . . Further, they are denied the right to choose a provider and may be subjected to a stranger-provider or institutionalization; either defeats the basic goals of the [program at issue] and the federal regulations.[15]

Lower courts have also considered whether state Medicaid criteria violated Section 504. By way of illustration, in *Duquette v. Dupuis*[16] the plaintiff contended that the state of New Hampshire violated Section 504 by providing medical assistance to persons under 18 who are blind but denying medical assistance to persons under 18 who suffer from other handicaps. The court granted the defendants' motion to dismiss the plaintiff's Section 504 claim on two grounds: First, the court held that Section 504 "does not override the express Medicaid program eligibility requirements and funding conditions found at 42 U.S.C. §1396a."[17] Second, the court held that Section 504 "does not require states to undertake 'affirmative action' such as expanded medical assistance programs to overcome the disabilities of handicapped persons. . . ."[18]

Along similar lines, in *Doe v. Colautti*[19] the Third Circuit considered the validity of a Pennsylvania medical assistance statute (enacted pursuant to the state's Medicaid program) providing that physically ill people were entitled to payment for private hospital care for however long they were in the hospital, while mentally ill people were entitled to payment for private hospital care for only 60 days. Doe complained that the statute discriminated against mentally ill persons in violation of Section 504. The Third Circuit found no violation of Section 504. The circuit court held that no discrimination occurred, because care for physical illness constitutes one type of service or benefit, which was applied to mentally ill and non-mentally ill people alike, while care for mental illness constitutes a different type of service or benefit. The court cited a provision in the analysis of the Section 504 regulations explaining that "a burn treatment center need not provide other types of medical treatment to handicapped people unless it provides such medical services to nonhandicapped persons. It could not, however, refuse to treat the burns of a deaf person because of his or her deafness."[20]

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[13] 148 Cal. App. 3d 862, 196 Cal. Rptr. 69 (Cal. App. 1983).

[14] 45 C.F.R. §84.4(b)(1) (1989).

[15] 196 Cal. Rptr. at 81-82.

[16] 582 F. Supp. 1365 (D.N.H. 1984).

[17] 582 F. Supp. at 1369.

[18] *Id.*

[19] 592 F.2d 704 (3d Cir. 1979).

Another case in which the plaintiff alleged discrimination in a state's operation of its Medicaid program is *Lynch v. Maher.*[21] In that case a quadriplegic alleged that the state of Connecticut violated Section 504 when it refused to pay for home-care services for the plaintiff and contended that the plaintiff required institutionalization. The plaintiff claimed that he was discriminated against in the operation of Connecticut's Medicaid program because the state "decided to disallow a benefit otherwise available—home-care payments—only because the plaintiff is a quadriplegic who lives alone."[22] The court recognized that under *Southeastern Community College v. Davis*[23] the state must "have a 'substantial justification' for not accommodating Lynch in the program of his choice before his handicap may be used as the basis of his exclusion."[24] The court held that whether such justification existed was a "fair question for litigation," and thus denied the defendants' motions for summary judgment or dismissal of the issue and granted a preliminary injunction in favor of the plaintiff.[25] The court stated:

> Unlike the deaf plaintiff in *Southeastern*, who could derive no substantial benefit from nursing school because she could not hope to ever become a nurse, Lynch would be benefited by receiving home medical care. Unlike the mentally ill plaintiff in [*Doe v.*] *Colautti*, seeking the benefits of a program for the physically ill, Lynch is not seeking any services from home care that it does not already provide. He asks only for services that are already provided to

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[20] 45 C.F.R. §84, App. A, at 362 (1989). In the opinion of the authors, the reasoning of the Third Circuit in *Doe v. Colautti* is unsound. First, only mentally ill people require treatment for mental illness. Second, the analogy to deaf burn victims fails. The issue in *Doe v. Colautti* was not whether a mental health hospital could refuse to treat someone for a *physical* illness, but whether a mental hospital (or a generic hospital with mental health services) could be precluded from treating someone for a *mental* illness.

[21] 507 F. Supp. 1268 (D. Conn. 1981).

[22] 507 F. Supp. at 1278 (footnotes omitted).

[23] 442 U.S. 397, 99 S. Ct. 2361 (1979).

[24] 507 F. Supp. at 1279.

[25] 507 F. Supp. at 1280.

> others. . . . Even if Lynch is unable to find an agency willing to provide more than eight hours of care a day, the state does not have a substantial interest in denying him reimbursement for eight hours of care a day only to induce him to enter an institution.
>
> The only modification to the program that may be necessary to accommodate Lynch is financial, that is, to pay the cost of home care to a private agency authorized to provide it. . . . The defendant did not introduce evidence that providing more than eight hours of care, if that were necessary to accommodate Lynch, would have a demonstrably burdensome effect.[26]

In *Cook v. Barry*[27] the plaintiffs claimed that a different form of discrimination occurred under Ohio's Medicaid program. In that case, the applications for Medicaid assistance submitted by disabled nursing home residents were denied because of omissions in the application forms. The plaintiffs claimed that due to their disabilities they were unable to complete the applications without the assistance of county departments of human services. The human services departments, which pursuant to Ohio statutes were the authorized representatives of the plaintiffs, did not furnish the requisite information. An Ohio state regulation allowed the state to hold Medicaid applicants liable for the omissions of their representatives. The plaintiffs claimed that that regulation violated Section 504.

In denying the defendants' motion for summary judgment, the court noted that the Ohio regulation was not invalid on its face, since it "does not, by its terms, preclude handicapped individuals from obtaining Medicaid benefits or mandate different treatment for handicapped individuals."[28] Nevertheless, the court noted that the plaintiffs might be able to show that the regulation, as applied to them, violated Section 504. The court stated:

> Plaintiffs allege that they were unable to complete Medicaid applications and furnish eligibility information because of their handicaps. If plaintiffs were eligible for Medicaid benefits in connection with their initial applications, but were denied same because of actions based on the plaintiffs' handicaps, plaintiffs may prevail on their claims that they were denied Medicaid benefits solely by reason of their handicaps.[29]

Just as some courts have held that Section 504 does not preclude states from limiting the extent of coverage to be provided by their Medicaid programs, at least one court has held that Section 504 does not preclude insurance carriers from limiting the scope of covered benefits to be provided to classes of disabled persons.

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[26] *Id.*

[27] 718 F. Supp. 632 (S.D. Ohio 1989)..

[28] 718 F. Supp. at 639.

[29] *Id.*

In *Bernard B. v. Blue Cross and Blue Shield of Greater New York*[30] the plaintiffs claimed that an insurance carrier's policy of excluding from insurance coverage psychiatric in-patient care in New York City Health and Hospitals Corporation (HHC) hospitals, while allowing coverage for non-psychiatric care in HHC hospitals and for psychiatric care in non-HHC hospitals, violated Section 504. The court disagreed. The court held:

> Medical coverage is structured around the identification of categories of benefits and a calculation of risk and consequent costs for that coverage. The fact that the benefit in question here remained outside the minimum coverage plan is a function of the limited risk coverage. Reasons other than handicap account for the exclusion. . . . The insurance characteristics of the benefit in question here which rendered it outside the minimum plan . . . [fall within the] "substantial justification" [exception to Section 504]. . . .[31]

The court concluded that when enacting Section 504 Congress did not intend to prohibit "all medical insurance which was less than total in its coverage," because

> [T]he necessary consequence of such a ruling would be either to end all medical insurance or to require drastic reduction in the amount of allowable benefits for those risks of primary concern to the covered employees. We do not believe that the Rehabilitation Act mandates that the decision between, for example, dental or psychiatric coverage, assuming cost considerations preclude both at a reasonable benefit level, is one which cannot be left to the employer, his employees and the insurer.[32]

Finally, at least one court has held that Section 504 does not apply to the right to refuse medical treatment. In *Ross v. Hilltop Rehabilitation Hospital*[33] the plaintiff was paralyzed from the neck down and unable to speak or swallow. He claimed that a hospital and doctor violated Section 504 when they did not comply with his requests (via use of a letter board) to have a gastrostomy tube disconnected. The plaintiff expressly stated that he wished to die. The hospital claimed that the plaintiff lacked the capacity to make decisions concerning what medical treatment to accept or refuse. The plaintiff claimed that the defendants discriminated against him solely on the basis of handicap when they refused to remove the tube because of their perception that the plaintiff was mentally handicapped. The plaintiff further claimed that the defendants discriminated against him on the basis of his physical handicap by failing to obtain court authorization for unwanted treatment that the plaintiff was physically unable to refuse.

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[30] 528 F. Supp. 125 (S.D.N.Y. 1981), *aff'd*, 679 F.2d 7 (2d Cir. 1982).

[31] 528 F. Supp. at 132.

[32] 528 F. Supp. at 133 (footnote omitted).

[33] 676 F. Supp. 1528 (D. Colo. 1987).

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After a lengthy trial, a state court determined that the plaintiff was mentally competent and that he had a constitutional right to refuse medical treatment. Accordingly, the plaintiff's tube was removed and the plaintiff died. Subsequently, the plaintiff's estate filed an action in federal court for damages during the period in which the defendants failed to comply with the plaintiff's instructions, asserting, *inter alia*, that defendants violated Section 504. In granting the defendants' motion for summary judgment, the district court ruled that although Section 504 applies to the right to *obtain* health care, "[t]he assertion that [Section 504] applies to a right to refuse medical treatment in a situation such as this is an extremely expansive view of 'health care', a view we have considered and reject."[34] The court stated:

> . . . [i]n our view, the Rehabilitation Act does not apply to the medical treatment decisions of a physically handicapped individual, of questionable mental competency, who requests his treating physician and hospital to terminate medical treatment. The application of the "otherwise qualified" requirement of Section 504 does not square with the facts in this case. [The plaintiff] was admitted to Hilltop for the purpose of obtaining medical treatment for his physical and mental handicap; the defendants' decisions on [the plaintiff's] request to terminate gastrostomy feedings were interwoven with their medical decisions regarding [the plaintiff's] treatment. Thus, in these circumstances, Section 504 . . . is inapplicable.[35]

Further, the court held in *Ross* that even if Section 504 did apply to the right to refuse medical treatment, the plaintiff had not shown a genuine issue of fact with respect to the question of whether the defendants discriminated against him. The court stated that the "[p]laintiff has not shown any instance where the defendants treated [him] differently from any other individual under their care, nor has the plaintiff shown that the defendants would have treated a 'competent patient' differently."[36]

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[34] 676 F. Supp. at 1538.

[35] 676 F. Supp. at 1539.

[36] *Id*. This portion of the court's ruling concludes that the plaintiff had not been discriminated against solely on the basis of his handicap. Another case in which the court found no discrimination solely on the basis of handicap is *Jackson v. Conway*, 476 F. Supp. 896 (E.D. Mo. 1979), *aff'd*, 620 F.2d 680 (8th Cir. 1980). The plaintiffs in *Jackson* alleged, *inter alia*, that the closure of acute in-patient facilities and some emergency room and out-patient facilities in one hospital, and the consolidation of those services at another hospital, violated Section 504. The plaintiffs sought an injunction prohibiting the consolidation. The district court held that despite testimony evidencing that it would be more difficult for handicapped people to travel the additional distance to the second hospital, the plaintiffs had failed to show "how proximity considered alone would appear to be a greater barrier to access to treatment at [the second hospital] for handicapped individuals 'solely by reason of [their] handicap[s].' " 476 F. Supp. at 905.

III. Special Issues Relating to Persons with Mental Disabilities or Mental Illness

In several instances mentally retarded individuals have sought to utilize Section 504 to secure a right to "habilitation" in the least restrictive setting possible.[37] Courts have generally rejected such claims. A leading case on this issue is *Garrity v. Gallen*.[38] In that case, residents of a New Hampshire school for mentally retarded persons, the Laconia State School, claimed that they had a right to habilitation in community living arrangements (CLAs) as opposed to being institutionalized. The plaintiffs' Section 504 claim was premised on the contention that placement at Laconia was discriminatory because mentally retarded persons were unnecessarily separated from the rest of society, and such segregation prohibited mentally retarded people from taking part in federally assisted programs available to others. In ruling on the plaintiffs' Section 504 claim, the court first held that Section 504 did not require the defendants "to provide community placements to all mentally retarded citizens."[39] Thus, the court rejected the plaintiffs' claim that Section 504 requires that mentally retarded persons be habilitated in the least restrictive environment possible. The court stated that Section 504 "cannot be construed so broadly as to require deinstitutionalization."[40]

Other courts have also held that Section 504 does not provide a generalized right to habilitation in the least restrictive setting feasible. In *Clark v. Cohen*,[41] for example, a mentally retarded plaintiff involuntarily committed to a state institution for almost 30 years sought a transfer to a CLA. The plaintiff contended that the state defendants violated Section 504, particularly the regulations requiring recipients of federal financial assistance to provide disabled persons with aids, benefits and services that are as effective as those provided to non-handicapped persons.[42] The plaintiff alleged that the provision of services to her at the institution for mentally retarded persons was discriminatory, because other mentally retarded people were provided services in more integrated settings, such as CLAs. The defendants, on the contrary, argued that the fact that the plaintiff was detained for 29 years at the institution rather than being placed in a CLA had "nothing to do with her handicap, but [was] merely a result of inadequate funding."[43] In ruling that the plaintiff had no cause of action under Section 504, the district court stated:

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[37] "Habilitation" is "the term of art used to refer to that education, training, and care required by retarded individuals to reach their maximum development." *Garrity v. Gallen*, 522 F. Supp. 171, 176 (D.N.H. 1981).

[38] *Id.*

[39] 522 F. Supp. at 213. In the opinion of the authors, this conclusion overstates the issue before the court. The question was whether the residents at LSS had a right to community placement—not whether *all* mentally retarded persons had that right.

[40] *Id.* It should be noted that, to the extent that habilitation efforts at Laconia may have been considered as appropriate education services, those services would be required to be provided in the least restrictive environment. For a more detailed discussion of what educational services may be considered appropriate, and what constitutes the least restrictive environment in which to provide such services, *see* chapter 16 of this text, *infra*.

[41] 613 F. Supp. 684 (E.D. Pa. 1985), *aff'd on other grounds*, 794 F.2d 79 (3d Cir.), *cert. denied*, 479 U.S. 962 (1986).

> I cannot explain the reason that plaintiff has not been given a CLA, and defendants could not offer any real explanation either, aside from a chronic lack of funds or bureaucratic misplacement of plaintiff over the years. Although I do not find these explanations satisfying, I cannot conclude that plaintiff has been detained at Laurelton solely because of her handicap. . . .[44]

The court noted that Section 504 prohibits unintentional, as well as intentional, discrimination against people with disabilities, but found that "the basis of the discrimination (whether intentional or unintentional) was not a factor related to the handicap plaintiff claims forms the basis of the discrimination."[45]

Similarly, in *Gieseking v. Schafer*[46] developmentally disabled plaintiffs alleged that the state refused to provide them with individualized habilitation treatment plans or services consistent with such plans. Specifically, the plaintiffs claimed that they were not receiving services provided to other individuals with disabilities, and thus were "being denied [those] benefits vis-à-vis other handicapped individuals 'solely' because of their handicaps."[47] The court held that the plaintiffs had failed to adequately allege a claim under Section 504. The court analogized to *Clark v. Cohen* when stating:

> . . . the proposed plaintiff class seeks individual habilitation plans and other services, not in spite of their handicaps, but because of their handicaps. In other words, the fact that plaintiffs are handicapped is the very reason that they are entitled to such services. . . . [T]he plaintiffs' complaint is defective in that it does not state that they were denied [those] services because of some distinction between their handicaps and the handicaps of other developmen-

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[42] 45 C.F.R. §§84.4(b)(i)-(iv) (1989).

[43] 613 F. Supp. at 693.

[44] 613 F. Supp. at 693.

[45] 613 F. Supp. at 694. The plaintiff ultimately prevailed, however, on constitutional grounds.

[46] 672 F. Supp. 1249 (W.D. Mo. 1987).

[47] 672 F. Supp. at 1263.

tally disabled individuals who have received individual habilitation plans and appropriate treatment.[48]

Although Section 504 may not require habilitation of mentally retarded persons in the least restrictive setting, recipients of federal financial assistance *do* have obligations to both mentally retarded and mentally ill persons under the Act. Thus, in *Garrity v. Gallen* the court concluded that Section 504 provided the plaintiffs with rights other than the right to treatment in CLAs, and held that the defendants had violated Section 504 in several ways.

First, the court in *Garrity v. Gallen* noted that Section 504 "is predicated upon the need for individualized treatment, [f]or only by evaluating and treating people on an individual basis will we avoid discrimination based on generalized assumptions and prejudices."[49] Pursuant to this requirement, Laconia took efforts to provide residents with individual service plans (ISPs), "which assess[ed] the present abilities of a given individual, establish[ed] goals to be sought, and diagram[med] a course of action to meet those goals."[50] As of the time of trial, however, Laconia had only completed ISPs for 65 percent of its residents, and arbitrary guidelines, premised on the building in which each resident lived, were imposed to determine which residents would receive ISPs. Thus, the court held that the defendants violated Section 504 "by according to certain individuals and by denying to others the benefit of the all-important ISP."[51]

Second, the court held that the defendants violated Section 504 by making "placements and disburs[ing] services based not on an individual assessment of the abilities and potentials of each resident but on the generalized assumption that certain *groups* of people (e.g., profoundly retarded or non-ambulatory people) are unable to benefit from certain activities and services."[52] The court noted that such "blanket discrimination" is prohibited by Section 504, which "prohibit[s] discrimination based on generalized assumptions about the abilities (or disabilities) of handicapped people."[53]

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[48] 672 F. Supp. at 1263.

And, in *Phillips v. Thompson*, 715 F.2d 365 (7th Cir. 1983), several hundred highly functioning mentally retarded individuals were placed in state mental institutions after the privately owned facility at which they resided pursuant to an Illinois state program was closed. The plaintiffs contended, *inter alia*, that the state violated Section 504 in denying them a right to alternative care by placement in a less restrictive residential setting. In holding that Section 504 had not been violated, the Seventh Circuit stated:

> [Plaintiffs] appear to contend that, under [Section 504, defendants] had the affirmative duty to create less restrictive community residential settings for them. But there is no contention that these class members, *because of their handicap*, are being denied access to community residential living that Illinois is affording to others. . . .

715 F.2d at 368. *See also, Sabo v. O'Bannon*, 586 F. Supp. 1132, 1137 (E.D. Pa. 1984) (noting that several courts "have agreed no cause of action exists where the gravamen of the plaintiff's complaint is that [S]ection 504 was violated by denying a mentally retarded individual placement in a residential, non-institutional facility," and holding that the requested placement would constitute "affirmative action" not required by Section 504). *Cf. Kentucky Association for Retarded Citizens, Inc. v. Conn.*, 674 F.2d 582, 585 (6th Cir. 1982) (stating that "we do not read Section 504 to prohibit all institutionalization" of mentally retarded persons, and noting that "the least restrictive alternative for some severely and profoundly retarded persons may be institutionalization"), *cert. denied*, 459 U.S. 1041 (1982).

[49] 522 F. Supp. at 213-14.

[50] 522 F. Supp. at 214.

[51] *Id.*

Third, the court noted that under Section 504 "[n]ot only must recipients refrain from discriminating against handicapped individuals, they must also take an active role in assuring that persons with impairments are afforded 'appropriate auxiliary aids.' "[54] Under the regulations, "all of the programs and activities at [Laconia], *when viewed in their entirety,* must be readily accessible to all handicapped persons."[55] Thus, the court ruled that Laconia could not "absolutely deny certain services to individuals without providing them equivalent services."[56] In so doing the defendants had violated Section 504.

Similarly, in *Lelsz v. Kavanagh*[57] the court held that "Section 504 prohibits unnecessarily segregated services for institutionalized persons."[58] The court cited *Garrity v. Gallen* when holding that "[a] state may not withhold academic, recreational, or other programming on the blanket assumption that mentally retarded individuals cannot benefit from such programming."[59] And, in *Klostermann v. Cuomo*[60] dischargees from state psychiatric care facilities who resided in shelters or on the streets claimed that the state of New York violated Section 504 by refusing to provide them with residential placement, care and supervision. The plaintiffs contended that the state *did* provide appropriate placement, care and supervision to *some* patients discharged from state psychiatric facilities, but because of the severity of their illnesses the plaintiffs were refused such treatment and consigned to life on the New York City streets. The court held that by presenting affidavits evidencing that "the more severely handicapped are allotted, *for that reason,* less assistance than to others in the same class . . ." the plaintiffs had stated a proper cause of action under Section 504.[61]

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[52] *Id.* (emphasis in original).

[53] 522 F. Supp. at 215.

[54] 522 F. Supp. at 217.

[55] *Id.* (emphasis in original).

[56] *Id.*

[57] 673 F. Supp. 828 (N.D. Tex. 1987), *appeal dismissed,* 710 F.2d 1040 (5th Cir. 1983).

[58] 673 F. Supp. at 838.

[59] 673 F. Supp. at 839.

[60] 126 Misc. 2d 247, 481 N.Y.S. 2d 580 (N.Y. Sup. Ct. 1984).

[61] 481 N.Y.S. 2d at 584 (emphasis in original). *See also, Goebel v. Colorado Department of Institutions,* 764 P.2d 785 (Colo. Sup. Ct. 1988). In that case, chronically mentally ill patients claimed

In some cases, however, courts have rejected the claims of mentally ill or mentally retarded plaintiffs on their merits. It has been held, for example, that Section 504 does not preclude a state from establishing equivalent but segregated day care services for handicapped individuals. In *Plummer v. Branstad*[62] the plaintiff was an individual with Huntington's Chorea who resided in an intermediate care facility (ICF) for individuals with handicaps. For several years Plummer attended a daily adult care program funded under Title XX of the Social Security Act.[63] Subsequently, Plummer was informed that she would no longer be eligible to receive Title XX funding for the day care program because an Iowa regulation prohibited such funding on behalf of ICF residents. The plaintiff claimed that the Iowa regulation violated Section 504. The plaintiff filed suit on behalf of herself and others similarly situated.

Specifically, the Iowa regulation provided that adult day care services funded under Title XX should be provided only to persons over 18 "who are impaired and are incapable of independent living without such services but who do not require twenty-four-hour inpatient care."[64] The court assumed that the plaintiffs were otherwise qualified to participate in day care programs and to receive Title XX funds, that the plaintiffs were physically, emotionally and psychologically capable of participating in such programs, and that the plaintiffs met the means and needs requirement for Title XX funding. The court found, however, that the plaintiffs were not denied Title XX funding solely on the basis of their handicap. Rather, the plaintiffs were denied such funding because they already received publicly funded ICF care; the state merely chose to reserve Title XX funding "for those not already receiving the plaintiffs' degree of publicly supported rehabilitative, custodial, or medical care."[65] The court recognized that the Section 504 "regulations stress effective, equal services for handicapped persons in integrated settings appropriate to their needs."[66] The court held, however, that "[t]he State's provision of adult daytime services to ICF residents in their ICFs rather than in separate, Title XX funded adult day care centers does not run afoul of these principles."[67]

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that they were denied adequate mental health care by the city and state. Specifically, the plaintiffs contended that the defendants failed to provide the more severely disabled persons with medical services. The court recognized that "discrimination on the basis of severity of handicap violates [Section 504]." 764 P.2d at 804. Because the evidence showed that only "higher functioning patients" had access to the relevant services, the state supreme court held that the trial court erred in dismissing the plaintiffs' Section 504 claim.

[62] 731 F.2d 574 (8th Cir. 1984).

[63] 42 U.S.C.A. §§1397-1397(f) (1983).

[64] 731 F.2d at 576.

[65] 731 F.2d at 579.

[66] 731 F.2d at 579 (citing 45 C.F.R. §84.4).

[67] 731 F.2d at 579.

It has also been held that Section 504 does not give a mentally disabled plaintiff the right to a placement of his or her choice. In *Dempsey v. Ladd*[68] parents of a mentally handicapped adult claimed that the Oregon Department of Human Resources violated Section 504 when it failed to pay for services provided to their son in a private residential care facility. The son, Dempsey, was placed in the residential care facility by his parents after the parents were informed that space was not available in state Mental Health Department (MHD) residential care facilities. While MHD offered to place Dempsey in a foster care facility until a vacancy occurred in an MHD residential care facility, Dempsey's caseworker considered the foster home placement to be inappropriate and the parents rejected that temporary placement offer. The state refused to pay for the services at the facility in which Dempsey was placed because it felt such placement was only appropriate for geriatric patients.

In reversing the district court's order that the state pay for the residential care services being provided Dempsey, the Ninth Circuit held that Dempsey was not an otherwise qualified handicapped individual because the law did not allow him to select a "placement of his choice."[69] Additionally, the Ninth Circuit held that Dempsey was not discriminated against solely on the basis of his handicap. The circuit court stated:

> There are many non-discriminatory reasons, including economy, morale, menu planning, security and the like which might commend specialized facilities for specialized treatment and the court should not usurp the agencies' power to make placement choices unless there is clear proof of actual discriminatory treatment.[70]

An unusual case discussing the right to placement is *Flowers v. Webb.*[71] In that case, a mentally retarded 19-year-old girl claimed that a city's facilities were not properly equipped to provide care or treatment to mentally retarded children. The plaintiff sought to be removed from a city facility and placed in a state facility. Specifically, the plaintiff contended that the state's failure to provide her with an appropriate placement violated Section 504 because the state discriminated against her solely on the basis of her mental retardation. The gravamen of the plaintiff's claim was that "different treatment is accorded to those mentally retarded children housed at diagnostic centers for extended periods of time than is accorded to retarded children similarly situated . . . who seek or receive state provided services."[72] Relying on the language set forth in *Southeastern Community College v. Davis*,[73] in which the Supreme Court held that to fit within the framework of Section 504 a plaintiff must be qualified "in spite of" his or her handicap,[74] the court noted:

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[68] 840 F.2d 638 (9th Cir. 1987).

[69] 840 F.2d at 640.

[70] 840 F.2d at 641. *See also, Murphy v. Senior Services Division*, 94 Or. App. 725, 767 P.2d 104 (Or. App. 1989). In that case the plaintiff challenged Oregon regulations restricting admission to private residential care facilities and requiring that residents be placed into separate facilities depending on their differing primary service needs. The court followed *Dempsey* in holding that the regulations did not violate Section 504. The court simply stated:

> Mentally ill persons are not denied services by reason of their general exclusion from facilities serving the aged, and exceptions to the general rule are provided in appropriate circumstances. . . . The policy decision not to commingle aged and mentally ill residents does not constitute unlawful discrimination.

767 P.2d at 106.

Cf. Manecke v. School Board of Pinellas County, 553 F. Supp. 787, 790 n.4 (M.D. Fla. 1982) (unclear whether a simple allegation that a mentally retarded individual was denied placement in a residential facility would state a claim under Section 504), *aff'd in part and rev'd in part on other grounds*, 762 F.2d 912 (11th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986).

[71] 575 F. Supp. 1450 (E.D.N.Y. 1983).

> Here, the plaintiff seeks to have the State provide her with the placement and care appropriate to a mentally retarded individual *because* she is handicapped—not *in spite of* her handicap. Thus, [the criterion] . . . that plaintiff establish she is "otherwise qualified" in spite of her handicap for state care and treatment, cannot be met in this instance.[75]

The court's reasoning in *Flowers v. Webb* contravenes both the letter and spirit of Section 504. The plaintiff in *Flowers* sought placement in a facility for *handicapped* persons. To say that as a handicapped individual she was not otherwise qualified in spite of her handicap to be placed in such a facility is nonsensical. The *Davis* rationale is inapposite; in *Davis* the plaintiff sought admission to a program for *non-handicapped* persons, not to a program for handicapped persons.[76]

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[72] 575 F. Supp. at 1455.

[73] 442 U.S. 397, 99 S. Ct. 2361 (1979) (for a discussion of *Southeastern Community College v. Davis*, *see* chapters 5 and 6 of this text, *supra*).

[74] 442 U.S. at 406, 99 S. Ct. at 2367.

[75] 575 F. Supp. at 1456 (emphasis in original).

[76] It should be noted that where placement issues involve education, Section 504 is directly applicable. A DHHS regulation promulgated pursuant to Section 504 specifically provides:

> A recipient to which this subpart applies and that operates or supervises a program or activity for persons who are institutionalized because of handicap shall ensure that each qualified handicapped person, as defined in §84.3(k)(2), in its program or activity is provided an appropriate education, as defined in §84.33(b). Nothing in this section shall be interpreted as altering in any way the obligations of recipients under Subpart D.

45 C.F.R. §84.54 (1989). *See also, Association for Retarded Citizens v. Olson*, 561 F. Supp. 473 (D.N.D. 1982), *aff'd in part and remanded in part*, 713 F.2d 1384 (8th Cir. 1983) (Section 504 requires states to provide mentally retarded persons with equal educational opportunities).

IV. Deaf Persons' Access to Jury Duty

The right of deaf persons to serve as jurors has usually been addressed on constitutional principles, and most courts considering the issue have held that a deaf person has a constitutional right to serve as a juror—with the assistance of an interpreter.[77] At least one court has addressed this question under Section 504, however, and has held that a state violated Section 504 when it excluded an individual from jury duty solely because she was deaf.[78]

A related issue is whether the state has the responsibility under Section 504 *to pay for* interpreters provided to assist a deaf juror. That question was answered in the affirmative in *Greater Los Angeles Council on Deafness (GLAD) v. Zolin*.[79] In that case, GLAD (a private agency) paid over $2,000 for interpreters to assist a deaf person who served as an alternate juror in a 22-day trial. GLAD sought reimbursement from, *inter alia*, the County of Los Angeles, the County Jury Commissioner and the County Director of Juror Services. When all parties refused to pay, GLAD filed suit on several grounds, including Section 504. The district court denied monetary relief to GLAD because it found the defendants either shielded by immunity or uninvolved with the jury selection process.

On appeal, the Ninth Circuit held that jury commissioners and directors of juror services are entitled to only qualified immunity with respect to their decisions not to provide interpreters for deaf jurors. Under the qualified immunity standard, such persons would be immune from liability only so long as their conduct did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known."[80] The circuit court held that qualified immunity did not help the defendants in *GLAD v. Zolin*, because "they waived their good faith defense."[81] The evidence showed that the defendants were aware of Section 504's "requirement of reasonable accommodation to handicapped persons . . . otherwise qualified to serve as jurors . . ." at the time they decided not to provide interpreters for the plaintiff.[82] Thus, the Ninth Circuit remanded GLAD's action under Section 504 for damages against the individual defendants.

Further, the Ninth Circuit held that it was irrelevant whether Los Angeles County participated in the selection of jurors. The circuit court stated that the relevant question was "whether the County participated in the decision to deny plaintiffs the assistance of interpreters."[83] Finding that the evidence showed such participation, the Ninth Circuit held that the county would be liable for damages "if a violation of [S]ection 504 is found to have occurred."[84] The Ninth Circuit refused to decide the ultimate issue of whether a violation of Section 504 had occurred, however. The circuit court stated that the district court "never reached the ultimate question [of] whether [S]ection 504 require[d] the defendants to provide sign-language interpreters for jurors serving on the Superior Courts," and that it would thus be inappropriate for the appellate court to decide that issue.[85]

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[77] This text will not address this constitutional question or the cases considering that question. For a law review article discussing this subject in depth *see* R. Lee, "Equal Protection and a Deaf Person's Right to Serve as a Juror," 17 *Review of Law and Social Change*, 1: 81 (1989-90).

[78] *De Long v. Brumbaugh*, 703 F. Supp. 399 (W.D. Pa. 1989).

[79] 812 F.2d 1103 (9th Cir. 1987).

[80] 812 F.2d at 1109.

[81] *Id.*

[82] *Id.*, n.7.

V. Access to Miscellaneous Services

Section 504 claims have also been raised with respect to a wide variety of other services. For example, *Joyner v. Dumpson*[86] involved access to state-subsidized care for children. A New York law required parents wishing to obtain state-subsidized residential care for their children to transfer temporary custody of their children to the state. A class of disabled New York children in need of special residential services whose parents could not afford the cost of such out-of-home treatment claimed that the state law violated Section 504. The plaintiffs alleged that the custody transfer requirement denied them benefits on the basis of their handicaps, because it deterred parents from placing their children in residential care and thus adversely impacted on handicapped children. The district court found that the plaintiffs had established a *prima facie* case of discrimination in violation of Section 504.

The Second Circuit reversed, however. The circuit court held in *Joyner* that the custody transfer requirement did not discriminate against handicapped children solely on the basis of their handicap, because "*all* parents whose children need state-subsidized 'home substitutes' must transfer temporary custody to the state, regardless of whether the child is or is not handicapped."[87] The court held that the custody requirement only distinguished between children with respect to the *type* of assistance needed, so that if a child required a state-subsidized home substitute the parents must transfer custody, but if a child required a different type of care the parents need not transfer custody. The court did not address the allegation that handicapped children require state-subsidized home substitutes much more than do non-handicapped children.

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[83] 812 F.2d at 1109.

[84] *Id.*

[85] 812 F.2d at 1107.

[86] 712 F.2d 770 (2d Cir. 1983).

[87] 712 F.2d at 776.

Doe v. Heatherly[88] involved access to federally subsidized programs. In that case, the Small Business Administration (SBA) refused to allow the disabled plaintiff to participate in the SBA's program designed to help socially and economically disadvantaged proprietorships by giving them preferential treatment in obtaining government contracts. The SBA found that the plaintiff was not "socially disadvantaged." In awarding summary judgment in favor of the defendants on the plaintiff's Section 504 claim, the court held that: (a) the plaintiff was not otherwise qualified for the SBA's program since he did not meet the socially disadvantaged test; and (b) the plaintiff was not otherwise qualified for enrollment in the SBA's program because "the nature of [the plaintiff's] handicap was not such as to qualify him for enrollment in the [SBA] program under criteria enacted by Congress."[89] The court refused to read Section 504 as "*mandating* a finding by the SBA of social disadvantage. . .in the case of every person who is handicapped."[90]

Sullivan v. City of Pittsburgh[91] involved access to alcoholic treatment centers. In that case, a group of recovering alcoholics sought to enjoin the City of Pittsburgh's closure of alcoholic treatment centers. The city refused to grant zoning ordinances that would allow the treatment centers to be maintained "on grounds that approval would diminish surrounding property values and hinder orderly community development."[92] The Third Circuit affirmed the district court's grant of a preliminary injunction in favor of the plaintiffs for the reason that the plaintiffs were likely to succeed on their claims that the city violated Section 504. The circuit court noted that the city had rejected zoning permits for the proposed relocation of the centers "based only on community hostility towards alcoholics."[93] Thus, the Third Circuit concluded that the plaintiffs were likely to succeed on their claim that the city's actions were premised on the plaintiffs' handicaps.[94]

Another case dealing with alcoholics and access to services is *Traynor v. Turnage*.[95] That case dealt with a Veterans Administration (VA) rule providing that veterans who did not exhaust their GI educational assistance benefits within ten years following their military service could obtain an extension of the delimiting period if they were prevented from using their benefits earlier by "a physical or mental disability which was not the result of [their] own willful misconduct. . . ."[96] A VA regulation defines "primary alcoholism" (alcoholism unrelated to an underlying psychiatric disorder) as "willful misconduct."[97] Veterans who were prevented from utilizing their GI benefits during the ten-year statutory period due to alcoholism claimed that the VA regulation violated Section 504. The Supreme Court disagreed. The Court held that: (1) The Rehabilitation Act as amended in 1978 did not contradict the more narrow and specific VA legislation; and (2) Section 504 does not prevent Congress from "establish[ing] priorities for the allocation of the limited resources available for veterans' benefits. . . ."[98]

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[88] 671 F. Supp. 1081 (D. Md. 1987), *aff'd.*, 854 F.2d 1316 (4th Cir. 1988).

[89] 671 F. Supp. at 1083.

[90] 671 F. Supp. at 1083-84 (emphasis in original).

[91] 811 F.2d 171 (3d Cir.), *cert. denied*, 484 U.S. 849 (1987).

[92] 811 F.2d at 175.

[93] 811 F.2d at 182.

[94] At least one Section 504 regulation specifically addresses access to services by drug addicts and alcoholics. 45 C.F.R. §84.53 (1989) (DHHS regulation) provides:

> A recipient to which this subpart applies that operates a general hospital or out-patient facility may not discriminate in admission or treatment against a drug or alcohol abuser or alcoholic who is suffering from a medical condition, because of the person's drug or alcohol abuse or alcoholism.

[95] 485 U.S. 535, 108 S. Ct. 1372 (1988).

At least two courts have considered the claims of prisoners seeking access to services provided at federally assisted prisons. In *Sites v. McKenzie*[99] the court held that Section 504 prohibited the exclusion of a state prisoner from participation in prison vocational rehabilitation programs because of the prisoner's disability. And, in *Bonner v. Lewis*,[100] when holding that Section 504 applies to programs in state prisons that receive federal financial assistance, the Ninth Circuit noted that "[b]y insuring that inmates have meaningful access to prison activities, such as disciplinary proceedings and counseling, the goals of both the institution and [Section 504] are served."[101]

These cases serve to illustrate the broad scope of Section 504. Clearly, the Act applies to *any* service provided to members of the public by a recipient of federal financial assistance.[102]

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[96] 38 U.S.C.A. §1662(a)(1) (1979 and West Supp. 1990).

[97] 38 C.F.R. §3.301(c)(2) (1989).

[98] 485 U.S. at 549, 108 S. Ct. at 1382. For further discussion of this case, *see* note 133 of this chapter, *infra*, and note 90 of chapter 4, *supra*.

[99] 423 F. Supp. 1190 (N.D. W. Va. 1976).

[100] 857 F.2d 559 (9th Cir. 1988).

[101] 857 F.2d at 562. The plaintiff in *Bonner v. Lewis* was a deaf prisoner who sought to require the prison to provide him with the services of an interpreter at various prison functions and activities. The Ninth Circuit reversed the district court's order of summary judgment in favor of the defendants.

[102] The obligation to provide services in a non-discriminatory manner is not *absolute*, however. Thus, in *Ciampa v. Massachusetts Rehabilitation Commission*, 718 F.2d 1, 4 (1st Cir. 1983), the court held that Section 504 did not require the defendant to provide services to " 'an emotionally disturbed client who is extremely difficult to serve, who often withdraws on his own whim from services provided, or rejects these services outright,' " or, in short, to a "client who himself completely subverts the service process."

VI. Access to Television

In several cases, hearing-impaired plaintiffs have alleged that television stations have an obligation under Section 504 to provide closed-caption television programs for the benefit of hearing-impaired viewers.[103]

The first case in which this issue was raised was *Gottfried v. Federal Communications Commission*.[104] Sue Gottfried filed a petition requesting the Federal Communications Commission (FCC) to deny renewal of the licenses of one public broadcasting television station (KCET-TV) and seven commercial television stations in Los Angeles. The FCC held that Section 504 did not apply to the seven commercial stations because they did not receive federal financial assistance. The FCC agreed that KCET—as a public broadcasting station—might be governed by Section 504, but it concluded that the Section 504 allegations against KCET were premature because the agency with authority to enforce compliance had not determined that the station had violated the Act.

On appeal, the District of Columbia Circuit agreed that the commercial stations were not recipients of federal financial assistance because the renewal of a broadcast license did not constitute financial assistance. While ordering that the licenses of the commercial stations be renewed, however, the circuit court informed the stations that because Section 504 reflects a national policy of extending increased opportunities to handicapped people, including hearing-impaired people, and because the Communications Act[105] requires that licensees serve the public interest, convenience and necessity,[106] the commercial stations must make some accommodations for hearing-impaired television viewers. With respect to the public broadcasting station, however, the District of Columbia Circuit held that since KCET was a public station that admittedly received federal financial assistance, it should be held to a stricter public interest standard. The circuit court ruled that the FCC could not find the services of public stations to be adequate to justify license renewal without at least inquiring specifically into the efforts of such public stations to meet the programming needs of hearing-impaired viewers.

The Supreme Court reversed the Court of Appeals' decision that Section 504 requires the FCC to review a public television station's license renewal application under a different standard than that applied to a commercial licensee's renewal application. The majority of the Court held that the FCC has no responsibility for enforcing Section 504, and that the Commission's duties derive solely from the Communications Act. The Court noted that while "regulations may be promulgated under [Section 504] that impose special obligations on the subsidized licensee,"[107] such regulations could only be promulgated by agencies responsible for enforcing the Act. Moreover, in the absence of such regulations, the Court opined, a television station could not be penalized "for failing to comply with a requirement of which it had no notice."[108]

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[103] Currently, hearing-impaired persons can purchase decoders to be connected to their television sets, to enable viewing of closed-captioned television shows on "line 21" of the television screen, which is reserved expressly for that purpose. In this manner hearing-impaired viewers may read what is said by the television actors in some television programs. The purchase of a decoder will not ensure captioning, however. Producers must expressly provide closed-captioning for each show in order to enable owners of decoders to receive such captions. (Currently, the three major networks—ABC, NBC, and CBS—close-caption most of their prime-time shows.)

[104] 655 F.2d 297 (D.C. Cir. 1981), *rev'd in part*, 459 U.S. 498, 103 S. Ct. 885 (1983).

[105] 47 U.S.C.A. §§151-609 (1962 and West Supp. 1990).

[106] 47 U.S.C.A. §309(a) (1962).

Eight months after the Supreme Court's ruling in *Gottfried*, the Ninth Circuit issued a ruling in *Greater Los Angeles Council on Deafness (GLAD) v. Community Television of Southern California.*[109] In that case, the plaintiffs contended that the Los Angeles public broadcasting station, KCET, violated Section 504 by refusing to provide *open*-captioning of all programs broadcast by the station,[110] and that Public Broadcasting System (PBS) and Corporation for Public Broadcasting (CPB) violated Section 504 by distributing federally financed programs to KCET despite the latter's failure to provide open-captioning. The plaintiffs also filed suit against the FCC, the Department of Health, Education and Welfare (HEW),[111] and the United States Attorney General. The plaintiffs claimed that the FCC had wrongfully failed to issue regulations requiring public broadcasting companies to comply with Section 504, that HEW had wrongfully distributed funds to grant recipients (such as KCET) who had violated Section 504, and that the Attorney General had wrongfully failed to enforce Section 504. The district court ruled in favor of the plaintiffs, and the Ninth Circuit reversed.

The district court ordered the DOE to terminate funding of television programs pending promulgation of Section 504 regulations. In reversing the district court's opinion, the Ninth Circuit held that a private plaintiff cannot assert that public remedy and that, in any event, since no regulations were promulgated, no station had violated any regulations and the denial of federal funds was thus not warranted.

The district court also ordered the Attorney General and the FCC to promulgate regulations for television stations to follow when implementing Section 504. In reversing the district court's orders, the Ninth Circuit relied on the

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[107] 459 U.S. at 512, 103 S. Ct. at 893.

[108] 459 U.S. at 511, 103 S. Ct. at 893. The Court declined to consider whether Section 504 requires a non-commercial broadcaster to take affirmative efforts to make its programming available to hearing-impaired viewers.

[109] 719 F.2d 1017 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984).

[110] Open captioning, as opposed to closed-captioning, is visible on the screen to *all* viewers, not just to viewers having special decoders.

[111] HEW is the predecessor to the current DHHS and Department of Education (DOE).

Supreme Court's ruling in *Gottfried* that the sole responsibility to enforce Section 504 lies with agencies administering federal financial assistance programs (at the time of this case HEW and the DOE—not DHHS), and *not* with the FCC or the Attorney General. In addition, the Ninth Circuit held that the district court erred in ordering the DOE to enforce Section 504 through rulemaking. The Ninth Circuit held that the DOE could choose whether to enforce Section 504 via rulemaking, by attaching conditions to federal grants given to television stations, or by adjudicating individual complaints against funding recipients.

In 1987 the FCC adopted rules and regulations pursuant to Section 504.[112] The position taken by the FCC was that the 1978 amendment extending the coverage of Section 504 to include the activities "conducted by" federal agencies was not intended to apply to the activities of the licensees of federal agencies. Thus, the FCC's regulations provided that "the programs or activities of entities that are licensed or certified by the Commission are not, themselves, covered by this part."[113] The FCC's rules were challenged in *California Association of the Physically Handicapped, Inc. v. Federal Communications Commission*.[114] The District of Columbia Circuit denied the plaintiffs' claims and ruled in favor of the defendants, thereby upholding the validity of the regulations. The circuit court relied on *Gottfried* when holding that the FCC "is not responsible for enforcing Section 504 through its licensing procedures."[115] Further, the circuit court held that "[t]he phrase 'program or activity conducted by any Executive agency' encompasses only the FCC's own activities, not those of entities licensed or certified by it."[116] Finally, the appellate court rejected the plaintiffs' argument that, even apart from Section 504, the Communications Act compels the FCC to impose captioning requirements on its licensees. The court held that "[t]he Rehabilitation Act does not compel through the Communications Act what it does not compel directly," and that the Commission must be given broad deference in evaluating the Communications Act's mandated standard of serving the "public interest."[117]

Section 504, therefore, has proven to be of no assistance to hearing-impaired persons seeking to compel television stations to caption their programs. Thus, hearing-impaired people are excluded to a large extent from obtaining meaningful access to television—a major aspect of modern American life. In some situations this lack of access is critical. By way of example, during the October 1989 earthquake in San Francisco, hearing-impaired residents experienced confusion and terror when they viewed television news commentators standing in front of areas of destruction (such as collapsed freeways), but were unable to understand any instructions relayed or explanations as to the extent of the damage.[118] To remedy this situation, the Television Decoder Circuitry Act of 1990 was enacted into law on October 15, 1990.[119] This Act amends Section 303 of the Communications Act of 1934[120] to require all television sets manufactured in—or for use in—the United States having picture screens at least 13 inches in size to be equipped "with built-in decoder circuitry designed to display closed-captioned television transmissions."[121] It is anticipated that if all sets are equipped with built-in decoders, television stations will voluntarily increase the number of closed-captioned programs to reach the market of over 24 million hearing-impaired persons in the United States.[122]

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[112] 47 C.F.R. §§1.1801-.1870 (1989). In 1978 Section 504 was amended to provide that the Act covered the activities of all federal agencies. 29 U.S.C.A. §794 (West Supp. 1990). As a federal agency the FCC was compelled to adopt regulations implementing Section 504. *See* note 1 of chapter 3 of this text, *supra*. It took the FCC 11 years to enact the requisite regulations.

[113] 47 C.F.R. §1.1830(b)(6) (1989).

[114] 840 F.2d 88 (D.C. Cir.), *reh'g denied*, 848 F.2d 1305 (D.C. Cir. 1988).

[115] 840 F.2d at 92.

[116] 840 F.2d at 93.

[117] 840 F.2d at 94.

VII. Discrimination Vis-à-Vis Other Handicapped People

As many of the cases discussed in this chapter evidence, Section 504 access-to-services cases frequently involve claims that one group of handicapped people is being discriminated against vis-à-vis another group of handicapped people, rather than vis-à-vis non-handicapped people. The Supreme Court has not ruled on the question of whether such claims fall within the purview of Section 504 and there is apparently some conflict among the lower courts with respect to this issue.

In *Colin K. v. Schmidt*,[123] for example, the First Circuit stated that "we have serious doubts whether Congress intended [Section] 504 to provide plaintiffs with a claim for discrimination vis-à-vis other handicapped individuals. . . ."[124] Other courts, however, have held that Section 504 *does* provide plaintiffs with such a claim. In *Gieseking v. Schafer*[125] the court stated that ". . . a [S]ection 504 cause of action may lie where plaintiffs assert discrimination between classes of handicapped persons. . . ."[126] Similarly, in *Garrity v. Gallen*[127] the court noted that under Section 504 programs must be available to all handicapped persons, and held that "profoundly retarded residents must be afforded . . . services to the same extent as mildly retarded residents. . . ."[128] In *Miller v. Woods*[129] the court held that it would violate Section 504 to deny health services to handicapped persons who had health-care providers living with them while providing such services to handicapped persons who did not have health-care providers living with them. And, in *Klostermann v. Cuomo*[130] the court held that it would violate Section 504 to treat mentally ill persons differently with respect to the provision of services based on the severity of their mental illnesses.[131]

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[118] *Deaf Counseling, Advocacy and Referral Agency (DCARA) News*, (December 1989-January 1990) 1.

[119] S. 1974, 101st Congress, 2d Sess. (1990). *see* 136 *Cong. Rec.* H8544 (Oct. 1, 1990) for the full version of the Act.

[120] 47 U.S.C.A. §303 (1962 and West Supp. 1990).

[121] S. 1974, §3, 136 *Cong. Rec.* H8544 (Oct. 1, 1990). It should be noted that the display of captions on such television sets is at the option of the viewer.

[122] Section 2(3) of S. 1974 notes that there are "24,000,000 people in the United States who are deaf or hearing-impaired." S. 1974 notes further that closed-captioned television "could provide benefits for the nearly 38 percent of older Americans who have some loss of hearing" [§2(4)]; could "assist both hearing and hearing-impaired children with reading and other learning skills and improve literacy skills among adults" [§2(5)]; and could "assist those among our Nation's large immigrant population who are learning English as a second language with language comprehension" [§2(6)]. 136 *Cong. Rec.* H8544 (Oct. 1, 1990).

[123] 715 F.2d 1 (1st Cir. 1983).

In the opinion of the authors, the reasoning of the latter courts is correct: Section 504 should be read as prohibiting discrimination against handicapped people vis-à-vis other handicapped people, as well as vis-à-vis non-handicapped people. Discrimination against particular classes or subclasses of handicapped people is just as invidious as any other form of discrimination and, as such, is within the scope of discriminatory conduct Congress sought to prohibit when enacting Section 504.

By way of example, suppose that a social service agency provides after-school activities for disabled children, including sports activities, field trips, organized games and crafts. The agency decides that it will not provide such services to blind children because they "would be unable to participate." The agency's decision, premised on stereotypical, unfounded beliefs as to the purported inability of blind children to participate in, or to enjoy, such activities, is discriminatory. The question is, is it any less discriminatory because the excluded children are being discriminated against vis-à-vis other handicapped children rather than vis-à-vis non-handicapped children?

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[124] 715 F.2d at 9.

[125] 672 F. Supp. 1249 (W.D. Mo. 1987).

[126] 672 F. Supp. at 1263.

[127] 522 F. Supp. 171 (D.N.H. 1981).

[128] 522 F. Supp. at 217.

[129] 148 Cal. App. 3d 862, 196 Cal. Rptr. 69 (Cal. App. 1983).

[130] 126 Misc. 2d 247, 481 N.Y.S. 2d 580 (N.Y. Sup. Ct. 1984).

[131] *See also, Doe v. Colautti*, 592 F.2d 704 (3d Cir. 1979) (allowing a suit challenging a statute that allegedly discriminated against mentally handicapped persons vis-à-vis physically handicapped persons, but holding that no discrimination had occurred).

To answer that question in the affirmative would be to circumvent the spirit—if not the letter—of Section 504. The DHHS Section 504 regulations provide that it constitutes a violation of Section 504 for a recipient of federal financial assistance to "[p]rovide different or separate aid, benefits, or services to handicapped persons *or to any class of handicapped persons*" unless such action is necessary for the provision of equally effective services.[132] The DHHS regulations, therefore, expressly recognize that Section 504 prohibits discrimination between different groups of handicapped persons.[133]

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[132] 45 C.F.R. §84.4(b)(1)(iv) (1989) (emphasis added).

[133] Section 504 does not invalidate federal statutes or executive orders that provide benefits for only one group or only some groups of disabled people, however. 45 C.F.R. §84.4(c) (1989) provides as follows:

> *Programs limited by Federal law.* The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

Where a federal statute or executive order provides benefits to one group of handicapped persons but not another, therefore, actions in accord with such a law would not violate Section 504. *See, e.g., Traynor v. Turnage,* 485 U.S. 535, 108 S. Ct. 1372 (1988) (holding that a Veterans Administration regulation that precluded alcoholics from being granted extensions of the ten- year period for obtaining veterans' benefits did not violate Section 504). Unfortunately, when citing 45 C.F.R. §84.4(c), the Supreme Court stated in *Traynor v. Turnage,* that "[t]here is nothing in [Section 504] that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons." 485 U.S. at 549, 108 S. Ct. at 1382. While this broad statement appears on its face to be open-ended, it is clear from the Court's opinion that the Court was referring to federal statutes that provided benefits to any one class (or some classes) of handicapped people. Thus, for example, the fact that the Internal Revenue Service provides an additional tax exemption for blind taxpayers, but not for other disabled taxpayers, does not violate Section 504.

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Section 504: Remedies and Attorneys' Fees

I. Overview

The remedies for violations of Section 504, as set forth in Section 505(a)(2) of the Rehabilitation Act,[1] are the same as the remedies available for violations of Title VI of the Civil Rights Act of 1964.[2] Title VI provides that the remedy for discrimination based on race is the withdrawal of federal financial assistance from the offending recipient.[3] Because Title VI applies only to those recipients of federal financial assistance whose primary objective is to provide employment,[4] some courts have held that damages under Title VI are available if a plaintiff shows that the primary purpose of the federal assistance received by the employer is to provide employment, or, in other words, where discrimination in employment "necessarily causes discrimination against the primary beneficiaries of the federal aid."[5] Other courts have held that the sole remedy under Title VI is withdrawal of federal assistance if the discriminatory conduct does not cease.[6]

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[1] 29 U.S.C.A. §794a (1985).

[2] 42 U.S.C.A. §2000d-6 (1981 and West Supp. 1990) (prohibiting discrimination on the basis of race by recipients of federal financial assistance).

[3] 42 U.S.C.A. §2000d-1 (1981). This section provides in pertinent part:

> Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law. . . .

[4] 42 U.S.C.A. §2000d-3 (1981) provides:

> nothing in this subchapter [42 U.S.C. §§2000d-2000d-4a] shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

Recognizing that the withdrawal of federal funds from a program does little to assist the individual victim of discrimination, however, the United States Supreme Court has held that remedies in addition to the withdrawal of federal financial assistance are available under Section 504, at least in the form of equitable relief and back pay.[7] But the Supreme Court has not resolved the question of whether a Section 504 plaintiff may recover *legal* damages.[8] While noting in *Smith v. Robinson* that many lower federal courts agree that damages may be available under Section 504, the Court declined to express an opinion on the issue.[9] And, despite the Court's statement in *Smith v. Robinson*, to date, as explained further in this chapter, the lower courts disagree with respect to the questions of whether—and when—damages are available under Section 504.

Congress has acted to make remedies more liberal under Section 504 on two occasions. First, in 1978 Congress added Section 505(b) of the Rehabilitation

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[5] *See, e.g., Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87, 89 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979). *See also, Ward v. Massachusetts Bay Transportation Authority*, 550 F. Supp. 1310, 1311 (D. Mass. 1982) (Title VI applies only when the primary purpose of federal aid is to provide employment).

[6] *See, e.g., Drayden v. Needville Independent School District*, 642 F.2d 129, 133 (5th Cir. 1981) (the "private right of action allowed under Title VI encompasses no more than an attempt to have any discriminatory activity ceased"); *Concerned Tenants Association v. Indian Trails Apartments*, 496 F. Supp. 522, 527 (N.D. Ill. 1980) ("no private right of action exists under Title VI for *monetary damages*") (emphasis in original); *Rendon v. Utah State Department of Employment Security Job Service*, 454 F. Supp. 534, 536 (D. Utah 1978) (Title VI does not provide a private cause of action for general and punitive damages in an employment discrimination action). *See also, Lieberman v. University of Chicago*, 660 F.2d 1185, 1187 n.5 (7th Cir. 1981) ("[t]he issue as to whether damages are available under Title VI is currently unresolved . . ."), *cert. denied*, 456 U.S. 937 (1982).

[7] *Consolidated Rail Corporation v. Darrone*, 465 U.S. 624, 630, 104 S. Ct. 1248, 1252 (1984) (victim of intentional discrimination under Section 504 may recover back pay). The Court did not view back pay as legal damages, but as a form of "equitable" relief, which "is grounded in the precepts of the conscience [rather than] . . . in any sanction of positive law." *Black's Law Dictionary*, 634 (4th ed., 1968). Equitable relief differs from legal damages, which are described in note 8 of this chapter, *infra*.

[8] Legal damages take several forms. "Compensatory" or "actual" damages are terms used to denote compensation for the injury sustained. Compensatory damages simply replace the loss caused by the wrong at issue. "Exemplary" or "punitive" damages are terms used to denote payment that *more* than compensates the victim for his or her injury. Such damages are intended to provide solace to a plaintiff who has suffered from the aggravated conduct of a defendant and to punish the defendant for such aggravated conduct.

[9] 468 U.S. 992, 1020 n.24, 104 S. Ct. 3457, 3472 n.24 (1984).

Act,[10] which gives courts discretion to award attorneys' fees to the prevailing party in an action challenging discrimination under the Act. Second, when enacting the Rehabilitation Act Amendments of 1986[11] Congress overruled the Supreme Court's holding in *Atascadero State Hospital v. Scanlon*,[12] and carved an express exception to the Eleventh Amendment for Section 504, thereby making states subject to federal court jurisdiction for alleged violations of the Act.[13] The 1986 Amendments similarly amended Title VI, making available to plaintiffs under both Title VI and Section 504 "remedies (including remedies both at law and in equity) . . . for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State."[14]

II. Damages

A. General Compensatory Damages

As previously noted, the Supreme Court has not yet determined whether compensatory damages are available for Section 504 violations. In *Consolidated Rail Corporation v. Darrone*[15] the Court merely held that Section 504 permits an award of back pay as a remedy. The Court noted that under Title VI both retroactive and prospective relief[16] are available, but did not decide the issue of damages—as opposed to equitable relief— under Section 504.[17] The lower courts are divided on the issue.

Numerous lower federal courts have applied various reasoning when holding that compensatory damages are available under Section 504. Perhaps the best rationale for awarding damages under Section 504 was expressed by the Eighth Circuit in *Miener v. Missouri*.[18] In that case, the Eighth Circuit began with the proposition that when a statute creates a right to sue in federal court for invasion of legal rights, federal courts should be able to employ any legal remedy to redress the invasion.[19] The court next noted that the ordinary remedy for Title VI violations is termination of federal funding, and that the regulations implementing Section 504 do not provide for individual suits for damages.[20] The court observed, however, that the lower courts are divided on the question of whether damages are available for violations of either Title VI or Title IX,[21] and concluded that analogies from those statutes gave little guidance.[22] Finding no convincing authority either from Section 504 cases or from other antidiscrimination statutes, the court examined the purpose of Title VI remedies. While noting that Title VI calls for termination of federal funds to programs that discriminate unlawfully, the court observed that this remedy fails to address adequately the concerns of the individual victim because the administrative proceedings and fund termination do not assist in redressing individual rights.[23] Finally, the court examined the legislative history of the 1978 Rehabilitation Act Amendments and found that the House-Senate Conference Committee had expressly rejected a proposed measure to prohibit monetary damages in actions against Rehabilitation Act vocational programs.[24] Following this lengthy analysis, the Eighth Circuit concluded that a full array of remedies, including damages, should be available to a Section 504 plaintiff.[25]

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[10] 29 U.S.C.A. §794a(b) (1985).

[11] Pub. L. No. 99-506, 100 Stat. 1807, 99th Cong., 2d Sess. (1986).

[12] 473 U.S. 234, 105 S. Ct. 3142 (1985).

[13] For a discussion of *Atascadero* and the Rehabilitation Act Amendments of 1986, *see* chapter 3 of this text, *supra*.

[14] 42 U.S.C.A. §2000d-7(a)(2) (West Supp. 1990).

[15] 465 U.S. 624, 630, 104 S. Ct. 1248, 1252 (1984).

[16] "Prospective" relief dates from the time that the plaintiff's action is resolved, while "retroactive" relief dates from a time that precedes resolution of the plaintiff's action.

[17] 465 U.S. at 630, 104 S. Ct. at 1252. The Court stated:

> [w]ithout determining the extent to which money damages are available under [Section] 504, we think it clear that [Section] 504 authorizes a plaintiff who alleges intentional discrimination to bring an equitable action for back pay.

[18] 673 F.2d 969 (8th Cir.), *cert. denied*, 459 U.S. 909 (1982).

Numerous courts, in addition to *Miener,* have awarded compensatory damages in Section 504 cases. In *Gelman v. Department of Education*[26] the court denied the defendant's motion to dismiss a claim for compensatory damages and held that general damages are recoverable in Section 504 actions. The court held that a Section 504 plaintiff could recover whatever compensatory damages she could prove. Similarly, in *Hutchings v. Erie City and County Library*[27] the court reasoned that the plaintiffs could recover monetary damages under Section 504 because mere equitable remedies were inadequate and compensatory damages were more consistent with the purpose of a civil rights statute.[28]

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[19] 673 F.2d at 977 (citing *Bell v. Hood,* 327 U.S. 678, 684 (1946)).

[20] 673 F.2d at 978.

[21] 20 U.S.C.A. §1681(a) (1990) (prohibiting discrimination on the basis of sex in any education program or activity receiving federal financial assistance).

[22] 673 F.2d at 978 n.9.

[23] 673 F.2d at 978.

[24] *Id.*

[25] The Eighth Circuit revisited *Miener* in 1986. *Miener v. Missouri,* 800 F.2d 749 (8th Cir. 1986). At this point the Eighth Circuit upheld the trial court's dismissal of Miener's Section 504 claim on the ground that under the Supreme Court's ruling in *Smith v. Robinson,* 468 U.S. 992, 104 S. Ct. 3457 (1984), Miener's sole cause of action was under the EAHCA. [For a discussion of *Smith v. Robinson, see* note 40 of chapter 6 of this text *supra,* and chapter 17 of this text, *infra.*] The Eighth Circuit held that Miener's claim for compensatory relief fell under the EAHCA in accord with the Supreme Court's holding in *Burlington School Committee v. U.S. Department of Education* 471 U.S. 359, 105 S. Ct. 1996 (1985). [For a discussion of the *Burlington* case *see* chapter 17 of this text, *infra.*]

[26] 544 F. Supp. 651, 654 (D. Colo. 1982) (denying defendant's motion to dismiss for failure to state a claim, and holding that compensatory damages could be awarded under Section 504 for the defendant's wrongful failure to accommodate the plaintiff because of her arthritis).

In *Poole v. South Plainfield Board of Education*[29] the court noted that compensatory damages are sometimes uniquely appropriate in Section 504 actions. In that case a school district refused to allow the plaintiff to participate on the high school wrestling team because he was missing one kidney. Poole sought relief under Section 504. Since Poole filed his claim after he graduated from high school, injunctive relief would provide him no benefit. Accordingly, the court held that under the circumstances monetary damages were the only appropriate relief.

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[27] 516 F. Supp. 1265 (W.D. Pa. 1981) (denying defendant's motion to dismiss and holding that the plaintiff could go forward with her claim for money damages, including damages for mental distress and exacerbation of a pre-existing medical condition).

[28] For other cases holding that damages are available under Section 504, *see, e.g., Wilder v. City of New York*, 568 F. Supp. 1132, 1136 (E.D.N.Y. 1983) (damages are available under Section 504 even in the absence of discriminatory intent); *Kling v. County of Los Angeles*, 769 F.2d 532, 534 (9th Cir.) ("[d]amages are an appropriate remedy under the Rehabilitation Act"), *rev'd on other grounds*, 474 U.S. 936, 106 S. Ct. 300 (1985); *Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1107 (9th Cir. 1987) ("plaintiffs suing under [S]ection 504 may pursue the full panoply of remedies, including equitable relief and monetary damages"); *accord Bonner v. Lewis*, 857 F.2d 559, 566 (9th Cir. 1988); *Nelson v. Thornburgh*, 567 F. Supp. 369, 383 (E.D. Pa. 1983) ("[i]n the absence of any indication that Congress intended to exercise [its power to limit remedies as part of an effort] to create a limited remedial scheme for [S]ection 504, it is a fair canon of statutory interpretation to indulge the presumption that Congress intended that the full panoply of remedies be available to the private plaintiff under [S]ection 504"), *aff'd mem.*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985); *Ciampa v. Massachusetts Rehabilitation Commission*, 718 F.2d 1, 5 (1st Cir. 1983) ("[w]e further assume, although without unanimous support from decided cases, that a private right of action for *damages* may be implied under [S]ection 504") (emphasis in original); *Fitzgerald v. Green Valley Area Education Agency*, 589 F. Supp. 1130 (S.D. Iowa 1984) (stating that "the better view is that the full panoply of remedies is available to a private plaintiff under [Section] 504," and awarding damages for mental anguish in the amount of $1,000 and for loss of earnings in an employment discrimination action in the amount of $5,150); *Sanders v. Marquette Public Schools*, 561 F. Supp. 1361, 1372 (W.D. Mich. 1983) (since neither termination of federal financial assistance nor injunctive relief would assist the plaintiff, only monetary relief would be "appropriate" relief under Section 504). *See also, Powell v. Defore*, 699 F.2d 1078, 1082 (11th Cir. 1983) (recognizing that damages are available under Section 504, but holding that no violation of the Act had occurred).

Several courts considering the question of whether damages are available under Section 504 to parents of handicapped children who placed their children in private schools due to alleged discriminatory treatment in public schools have recognized that damages are available, but have held that such damages are limited to the actual cost of the private school tuition. *See e.g., David H. v. Spring Branch Independent School District*, 569 F. Supp. 1324, 1331 (S.D. Tex. 1983); *Gregg B. v. Board of Education of Lawrence School District*. 535 F. Supp. 1333, 1340 (E.D.N.Y. 1982). *See also, Barnett v. Fairfax County School Board*. 721 F. Supp. 755, 756 (E.D. Va. 1989) (in so ruling the court stated that Section "504 does not create any general tort liability for educational malpractice," and that "before damages can be sought for basic education claims such as those under [Section] 504, there must be a showing of bad faith or intentional discrimination").

[29] 490 F. Supp. 948 (D.N.J. 1980).

The *Poole* rationale seems particularly appropriate in discrimination cases not involving employment, in which injunctive relief will frequently not benefit the plaintiff.[30] Even in employment cases, however, courts have granted monetary relief where ordinary equitable remedies are shown to be inadequate. In *Crane v. Dole*,[31] for example, the court held that the plaintiff had been unlawfully refused a job due to his deafness. The court awarded the plaintiff back pay and benefits from the date he should have been hired. In addition, because no jobs were immediately available, the court held that Crane was entitled to front pay (an amount equal to the salary he would have received if given a job) until a job became available for him. Although the court did not discuss damages specifically, the touchstone of the court's remedial order was to make the plaintiff whole for the wrong the discrimination caused. In the opinion of the authors, courts should retain this flexibility to order such relief as is appropriate under the circumstances in order to fulfill the statutory mandate of Section 504.

Another case recognizing front pay as an available remedy under Section 504 is *Ross v. Beaumont Hospital*.[32] In that case the court found that reinstating a surgeon to her position at the hospital would not be a practical remedy due to the "extraordinarily tense relationship existing" between the plaintiff and other hospital personnel.[33] Accordingly, the court instructed the jury to determine: (1) whether any of the damages incurred by the plaintiff as a result of the loss of her job would "be sustained with reasonable certainty into the future";[34] (2) the extent of the plaintiff's loss of future earnings up to the time that the relationship between the plaintiff and the hospital "would otherwise have been terminated"; and (3) whether the plaintiff would "suffer any mental anguish, embarrassment, humiliation or outrage in the future."[35] The jury awarded the plaintiff $16,700 for each of five years as future damages. Subsequently, however, the district court entered a judgment notwithstanding the jury's verdict in favor of the defendant hospital for the reason that the evidence dispositively showed that the plaintiff was not terminated from her job solely on the basis of her handicap.[36]

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[30] *See also, Patton v. Dumpson*, 498 F. Supp. 933, 939 (S.D.N.Y. 1980) (where child welfare agencies failed to provide a handicapped child with adequate and appropriate care, the court stated that "[w]here, as here, money damages are the only means of compensating a victim of past discrimination, that remedy must be available to the plaintiff").

[31] 617 F. Supp. 156 (D.D.C. 1985).

[32] 678 F. Supp. 680 (E.D. Mich. 1988), *app. dism'd without op.*, 844 F.2d 789 (6th Cir. 1988).

[33] 678 F. Supp. at 682.

[34] 678 F. Supp. at 683.

[35] *Id.*

[36] 687 F. Supp. 1115 (E.D. Mich. 1988).

Some courts, to the contrary, have held that compensatory damages are not available under Section 504. In so ruling, a few courts have relied on *Guardians Association v. Civil Service Commission*.[37] In *Guardians* a majority of the Supreme Court suggested that under Title VI general compensatory damages may be available only to remedy *intentional* discrimination.[38] Plaintiffs in *Guardians* challenged New York City's policy of using pre-1972 examination scores to determine police officers' seniority and lay-off status, claiming that the pre-1972 examinations had a disparate impact on certain minorities. In a decision fostering five separate opinions, the Supreme Court affirmed the Second Circuit's holding[39] that to succeed on a claim under Title VI the plaintiff must show discriminatory intent rather than just statistically demonstrable disparate impact.

After *Guardians*, some lower courts applied the Supreme Court's Title VI reasoning to Section 504 claims. In *Sabo v. O'Bannon*,[40] for example, the court dismissed a claim for damages under Section 504 on the ground that the claim could not proceed without an allegation of intentional discrimination. The court interpreted *Guardians* as holding that Title VI (and thus Section 504) did not give rise to a claim for damages unless the plaintiff could show intentional discrimination. Similarly, the Fifth Circuit upheld a summary judgment against plaintiffs who failed to allege intentional discrimination under Section 504 in *Marvin H. v. Austin Independent School District*.[41] The court held that Title VI, and thus Section 504, would only support a private action for declaratory and injunctive relief absent a claim of intentional discrimination.[42]

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[37] 463 U.S. 582, 103 S. Ct. 3221 (1983).

[38] 463 U.S. 582, 103 S. Ct. 3221. *See also*, 463 U.S. 584, 103 S. Ct. 3223 (White, J.); 463 U.S. at 615, 103 S. Ct. at 3239 (Marshall, J. dissenting); 463 U.S. at 635, 103 S. Ct. at 3250 (Stevens, J. dissenting).

[39] *Guardians Association v. Civil Service Commission*, 633 F.2d 232 (2d Cir. 1980), *aff'd*, 463 U.S. 582, 103 S. Ct. 3221 (1983).

[40] 586 F. Supp. 1132, 1138 (E.D. Pa. 1984).

[41] 714 F.2d 1348, 1356 (5th Cir. 1983).

[42] Other courts have followed similar reasoning. *See, e.g., Timms v. Metropolitan School District*, 722 F.2d 1310, 1318 n.4 (7th Cir. 1983) (to the extent that relief under Section 504 parallels rights under the EAHCA, damages are only available for "bad faith or other exceptional circumstances"); *Carter v. Orleans Parish Public Schools*, 725 F.2d 261, 264 (5th Cir. 1984) (plaintiff cannot recover damages under Section 504 without showing intentional discrimination with respect to a child's placement in school); *Scokin v. Texas*, 723 F.2d 432, 441 (5th Cir. 1984) (there is no private right of action for damages under Section 504 absent intentional discrimination); *Barnett v. Fairfax County School Board*, 721 F. Supp. 755, 756 (E.D. Va. 1989) ("before damages can be sought for basic education claims such as those under [Section] 504, there must be a showing of bad faith or intentional discrimination"); *Mark R. v. Board of Education*, 546 F. Supp. 1027 (D. Ill. 1982) (damages not available under Section 504 for the alleged failure to provide appropriate education for handicapped child absent bad faith on the part of the school district), *aff'd mem.*, 705 F.2d 462 (7th Cir. 1982).

To the contrary, in *Wilder v. City of New York*, 568 F. Supp. 1132, 1135-36 (E.D.N.Y. 1983), the court held that the *Guardians* rationale should *not* apply to cases under Section 504 because "Section 504

In 1985, however, the Supreme Court recognized in *Alexander v. Choate*[43] that Section 504 may be violated even in the absence of discriminatory intent.[44] As a result of this ruling, it is arguable that the rationale that under Title VI compensatory damages cannot be awarded absent discriminatory intent should not apply to cases arising under Section 504. Arguably, the reasoning followed by the courts in *Sabo v. O'Bannon* and *Marvin H. v. Austin Independent School District* conflicts with the Supreme Court's decision in *Alexander v. Choate*. The Court has not ruled on this issue, though.

Still other courts have applied different reasoning when rejecting the availability of compensatory damages under Section 504. In *Ruth Anne M. v. Alvin Independent School District*,[45] for example, the court concluded that Congress had not expressed any intent to create a general cause of action for damages under Section 504. The court expressed its belief that Congress knew how to create an action for damages when it wished to do so, and that the Act reflects the intent of Congress to limit Section 504 to equitable and injunctive relief.[46] In *Longoria v. Harris*[47] the court held that the decision in *Ruth Anne M.* "represents sound reasoning in light of the potentially massive financial liability which would be imposed upon recipients of federal assistance were . . . a right [to damages] acknowledged."[48] The court ruled that "reinstatement with seniority and the return of lost pension benefits are inappropriate [under Section 504], as such remedies are a form of damages."[49]

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differs from Title VI in that discriminatory intent is not essential to a violation of the Rehabilitation Act."

[43] 469 U.S. 287, 105 S. Ct. 712 (1985).

[44] The Court stated:

> While we reject the boundless notion that all disparate-impact showings constitute *prima facie* cases under [Section] 504, we assume without deciding that [Section] 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped.

469 U.S. at 299, 105 S. Ct. at 719.

[45] 532 F. Supp. 460 (S.D. Tex. 1982).

[46] 532 F. Supp. at 471-72.

[47] 554 F. Supp. 102 (S.D. Tex. 1982).

[48] 554 F. Supp. at 106.

[49] 545 F. Supp. at 108. *See also, Doe v. Southeastern University*, 732 F. Supp. 710 (D.D.C. 1990) (holding that for the court to allow an award of damages under Section 504 would "be to engage in judicial activism," and that "[i]f Congress feels that additional remedies are necessary to protect the rights of handicapped individuals, Congress must make that law, not this Court").

For other cases denying damages under Section 504, *see, e.g.*, *Strathie v. Department of Transportation*, 547 F. Supp. 1367, 1378 (E.D. Pa. 1982) (proper remedy for a violation of Section 504 in denying deaf plaintiff a school bus driver's license was termination of federal funds, not damages to plaintiff),

B. Damages for Pain and Suffering or Mental Anguish

In *Hurry v. Jones*[50] the district court held that damages for pain and suffering could be awarded under Section 504 to compensate a handicapped child who had been discriminated against in the educational context. And, in *Fitzgerald v. Green Valley Area Education Agency*[51] the court allowed damages of $11,000 for mental anguish resulting from employment discrimination under Section 504. Similarly, in *Recanzone v. Washoe County School District*[52] the court held that a handicapped teacher who suffered emotional and psychological distress after she was discriminated against by her employer was entitled to $70,000 in damages.

Numerous courts, however, have held that damages for pain and suffering or mental anguish are not permissible under Section 504. In *Marshburn v. Postmaster General of the United States* the court noted that "the Rehabilitation Act do[es] not provide for compensatory damages for pain and suffering."[53] Similarly, in *Martin v. Cardinal Glennon Memorial Hospital*[54] the court read Section 504 narrowly when concluding that the Act does not provide for damages for mental suffering and embarrassment. And, in *Rhodes v. Charter Hospital*,[55] when ruling that "damages for emotional distress are unavailable under [S]ection 504,"[56] the court noted that in *Alexander v. Choate* the Supreme Court held that there are two countervailing considerations at issue in Section 504 actions—"the need to give effect to the statutory objectives and the desire to keep [Section] 504 within

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vacated on other grounds, 716 F.2d 227 (3d Cir. 1983); *Reineman v. Valley View Community School District*, 527 F. Supp. 661, 665 (N.D. Ill. 1981) (damages not recoverable under Section 504 "for a *claimed wrongful exclusion from the benefits of [the] EAHCA*," since that would allow an end-run around the EAHCA) (emphasis in original); *Silverstein v. Sisters of Charity of Leavenworth Health Services Corp.*, 38 Colo. App. 286, 559 P.2d 716 (1977) (monetary damages not available under Section 504); *Byers v. Rockford Mass Transit District*, 635 F. Supp. 1387 (N.D. Ill. 1986) (while back pay is recoverable under Section 504, compensatory damages are not recoverable under the Act).

[50] 560 F. Supp. 500 (D.R.I. 1983), *aff'd in part and rev'd in part on other grounds*, 734 F.2d 879 (1st Cir. 1984).

[51] 589 F. Supp. 1130 (S.D. Iowa 1984).

[52] 696 F. Supp. 1372 (D. Nev. 1988).

[53] 678 F. Supp. 1182, 1184 (D. Md. 1988), *aff'd mem.*, 861 F.2d 265 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 812 (1989). *Accord, Liller v. Baltimore County*, 51 Fair Empl. Prac. Cas. (BNA) 1352 (D. Md. 1989) (noting that monetary damages are available under Section 504 but citing *Marshburn* in holding that such damages are limited).

[54] 599 F. Supp. 284 (E.D. Mo. 1984).

[55] 730 F. Supp. 1383 (S.D. Miss. 1989).

[56] 730 F. Supp. at 1385.

manageable bounds."[57] The court in *Rhodes* stated that "[h]ardly anything could have greater potential for rendering [S]ection 504 actions unmanageable than the allowance of damages for emotional distress."[58]

A more explicit explanation for denying damages for mental suffering under Section 504 was set forth in *Bradford v. Iron County C-4 School District*.[59] That court stated:

> Damages for mental suffering and humiliation are difficult to measure at best, are often sizeable, and have been editorialized as gratuitous bonuses or prize money for prosecuting a successful suit. . . . The incremental remedial and deterrent effect that would be occasioned by damages for mental anxiety or humiliation does not warrant imposing significant added demands on funds intended to reach other innocent beneficiaries of federal financial assistance programs. As was said in a different context, [Section] 504 was not intended to create a general tort liability.[60]

C. Punitive Damages

Even courts that have recognized that general damages may be awarded under Section 504 have generally held that punitive damages are not recoverable for violations of the Act.[61] The courts seem generally hesitant to open public coffers to punitive damage liability unless Congress clearly or expressly makes such a remedy available under the particular statute at issue.[62]

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[57] 469 U.S. 287, 299, 105 S. Ct. 712, 719 (1985) (cited at 730 F. Supp. at 1385).

[58] 730 F. Supp. at 1385. *Accord, Shinault v. American Airlines, Inc.*, No. Civ. Act. J89-0254(B), slip op. (S.D. Miss. May 25, 1990).

[59] 36 Fair Empl. Prac. Cas. (BNA) 1296 (E.D. Mo. 1984).

[60] 36 Fair Empl. Prac. Cas. (BNA) at 1302 (citation omitted).

Another decision holding that damages for pain and suffering are not available under Section 504 is *Shuttleworth v. Broward County*, 649 F. Supp. 35 (S.D. Fla. 1986) (no damages under Section 504 for pain and suffering).

[61] *See, e.g., Gelman v. Department of Education*, 544 F. Supp. 651, 654 (D. Colo. 1982) (a plaintiff may not claim punitive damages under Section 504); *Martin v. Cardinal Glennon Memorial Hospital*, 599 F. Supp. 284 (E.D. Mo. 1984) (punitive damages not available under Section 504); *Singh v. Superintending School Committee*, 601 F. Supp. 865, 867 (D. Me. 1985) (declining to award punitive damages under Section 504 due to a general policy against awarding punitive damages against municipalities, and because Title VI does not mention punitive damages). *See also, Byers v. Rockford Mass Transit District*, 635 F. Supp. 1387 (N.D. Ill. 1986) (neither compensatory nor punitive damages available under Section 504); *Shinault v. American Airlines, Inc.*, No. Civ. Act. J89-0254(B), slip op. at 13 (S.D. Miss. May 25, 1990) (punitive damages are not recoverable under Section 504 because "[t]he statutory scheme of the Rehabilitation Act is remedial and not punitive"). *Cf. Doe v. Centinela Hospital*, No. CV 87-2514 PAR (PX), slip op. (C.D. Cal. June 30, 1988) (available on Lexis genfed library) (stating that "[t]he weight of authority holds that punitive damages are not available under [Section] 504," but deferring a ruling on the availability of punitive damages until a later date).

One court, to the contrary, has noted that "punitive damages are presumably available under [Section] 504." *Fitzgerald v. Green Valley Area Education Agency*, 589 F. Supp. 1130, 1138 (S.D. Iowa 1984). That court found, however, that punitive damages were not available under the facts of that case.

III. Actions Under Both Section 504 and Section 1983

In part because of the uncertain availability of damages in Section 504 actions, where state action is at issue plaintiffs have often joined Section 1983 claims[63] with their Section 504 actions. Under Section 1983, damages may be available against an individual who, acting under color of state law, deprives another individual of a right secured by federal law. When filing actions under both Sections 1983 and 504, some plaintiffs have claimed violations of rights directly granted by the Constitution and actionable under Section 1983.[64] Other plaintiffs have filed suit on statutory grounds rather than on constitutional grounds, and claimed that violations of Section 504 were themselves actionable under Section 1983.[65]

The availability of Section 1983 to vindicate rights under Section 504 was especially important before a private right of action under Section 504 became so well established. As the court noted in *Boxall v. Sequoia Union High School District,* "[Section] 1983 actions are available to enforce federal statutory rights even if otherwise there could be no private action."[66] When an action arose under both Sections 1983 and 504, a court might be willing to award damages under Section 1983 as long as the plaintiff proved the underlying Section 504 claims.[67]

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[62] *See, e.g., Singh v. Superintending School Committee,* 601 F. Supp. 865 (D. Me. 1985).

[63] 42 U.S.C.A. §1983 (1981) provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity, or other proper proceedings for redress.

[64] *See, e.g., Hurry v. Jones,* 560 F. Supp. 500, 508-09 (D.R.I. 1983), *aff'd in part and rev'd in part on other grounds,* 734 F.2d 879 (1st Cir. 1984).

[65] *See, e.g., Boxall v. Sequoia Union High School District,* 464 F. Supp. 1104, 1113 (N.D. Cal. 1979) (refusing to dismiss alleged Section 504 violation and claim for damages under Section 1983 and recognizing that Section 1983 applies to vindicating Section 504 rights). *Cf., De La Cruz v. Tormey,* 582 F.2d 45, 59-61 (9th Cir. 1978), *cert. denied,* 441 U.S. 965 (1979) (applying Section 1983 to violation of Title IX, even if no private right of action exists under Title IX). *But see, Poole v. South Plainfield Board of Education,* 490 F. Supp. 948, 949 (D.N.J. 1980) (Section 504 itself permits claim for money damages so an action under Section 1983 is not required).

[66] 464 F. Supp. 1104, 1110 n.7 (N.D. Cal. 1979).

Before other congressional action—the promulgation of the Civil Rights Remedies Equalization Amendment in 1986[68]—plaintiffs had an additional reason for joining their Section 504 claims with Section 1983 claims. Actions under Section 1983 had long been held to be excepted from state sovereign immunity under the Eleventh Amendment,[69] but it was considered possible that the Eleventh Amendment would bar a suit for damages filed directly under a federal statute, such as Section 504. In *Edelman v. Jordan*[70] the Supreme Court cast into doubt the ability of a plaintiff to vindicate rights created directly by a federal statute by suing under that statute, at least where the suit was against a state, even though the plaintiff could bring substantially the same claim under Section 1983. In that case, the plaintiffs sued to recover from the state of Illinois payments made to the state under the Social Security Act[71] for a program of aid to the aged, blind or disabled. The plaintiffs claimed that the payments had been distributed unlawfully. The Court held that an action under the Social Security Act to recover such payments was a claim for damages, no matter how characterized, and was thus barred by the Eleventh Amendment.[72] Thus, due to potential Eleventh Amendment problems with Section 504 suits prior to enactment of the 1986 Civil Rights Remedies Equalization Amendment, the availability of Section 1983 to assist plaintiffs in vindicating their rights was critical.

There has been some disagreement, however, as to whether Section 1983 provides an additional means of seeking redress for unlawful discrimination, thereby enabling plaintiffs to obtain remedies under Section 1983 that are not available under Section 504.[73] Although Section 1983 is no longer necessary as a tool to vindicate rights under Section 504 due to disputes about a private right of action or Eleventh Amendment immunity, it may still serve as a viable means of avoiding potential rulings that compensatory damages are not available under

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[67] *See, e.g., Hutchings v. Erie City and County Library*, 516 F. Supp. 1265 (W.D. Pa. 1981) (compensatory damages available when plaintiff sues under both Sections 504 and 1983 because federal rights should have full panoply of remedies).

[68] *See* notes 37 and 38 and corresponding text of chapter 3 of this text, *supra*.

[69] *See, e.g., Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908) (Eleventh Amendment no bar to suit under Section 1983 to enjoin the state attorney general from enforcing a state statute).

[70] 415 U.S. 651, 94 S. Ct. 1347 (1974).

[71] 42 U.S.C.A. §§1381-1385 (1983 and West Supp. 1990).

[72] *Id.* In *Edelman*, the plaintiffs did *not* sue under Section 1983.

[73] *Compare Boxall*, 464 F. Supp. at 1104, *with Manecke v. School Board*, 553 F. Supp. 787, 790-91 (M.D. Fla. 1982) (action under Section 1983 not permitted because Congress intended Section 504 to provide exclusive equitable relief for handicap discrimination), *aff'd in part and rev'd in part on other grounds*, 762 F.2d 912 (11th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986).

Section 504. Whether Section 1983 may permissibly be utilized in this manner to enforce Section 504 is unclear, however. In *Pennhurst State School and Hospital v. Halderman* the Court suggested that the remedies available under Section 505 of the Rehabilitation Act *might* be exclusive, thereby precluding additional remedies for conduct held violative of Section 504.[74] If that is so, Section 1983 remedies would be unavailable where a plaintiff could sue under Section 504.[75] Several lower courts, however, have approved the use of Section 1983 to enforce rights created by Section 504.[76] Moreover, in *Guardians Association v. Civil Service Commission*, three of the five justices who addressed the issue opined that Section 1983 authorizes monetary relief for violations of Title VI, and thus by analogy for violations of Section 504.[77]

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[74] 451 U.S. 1, 29, 101 S. Ct. 1531, 1545 (1981) (noting with approval the suggestion "that [Section] 1983 would not be available where the 'governing statute provides an exclusive remedy for violations of its terms' " [*quoting Maine v. Thiboutot*, 448 U.S. 1, 22 n.11, 100 S. Ct. 2502, 2513 n.11 (1980) (Powell, J. dissenting]). *But see*, *Pennhurst*, 451 U.S. at 52-53, 101 S. Ct. at 1557 (White, J. dissenting in part) (a court may presume that any federal statute that creates federal rights may be enforced through Section 1983 unless Congress indicates that Section 1983's remedies are inconsistent with congressional intent when enacting the underlying federal statute).

[75] *See*, *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 101 S. Ct. 2615 (1981) (Section 1983 not available as a remedy if underlying federal law carries its own exclusive relief). *See also*, *Manecke v. School Board*, 553 F. Supp. 787, 791 (M.D. Fla. 1982) (Section 1983 relief not available because Section 504's scheme of equitable remedies is intended to be exclusive), *aff'd in part and rev'd in part on other grounds*, 762 F.2d 912 (11th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986).

[76] *See, e.g.*, *Cordero-Martinez v. Aponte-Roque*, 685 F. Supp. 314, 316 (D.P.R. 1988) (action under both Sections 1983 and 504 permitted); *Conlon v. Long Beach*, 676 F. Supp. 1289, 1298 (E.D.N.Y. 1987) (remedies under Section 504 not so complete as to leave no room for relief under Section 1983); *Byrne v. Board of Education*, 51 Empl. Prac. Dec. Para. 39,303 (E.D. Wis. 1989) ("Congress did not intend to preclude a cause of action under [Section] 1983 for violations of [Section] 504"); *Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372, 1382 (10th Cir. 1981) (Section 504 confers substantive rights that may be enforced in a Section 1983 action); *Shuttleworth v. Broward County*, 639 F. Supp. 654, 658-60 (S.D. Fla. 1986) (claims may be brought simultaneously under Sections 1983 and 504); *Christopher N. v. McDaniel*, 569 F. Supp. 291, 298 (N.D. Ga. 1983) ("[t]his court is inclined to rule that a claim under [Section] 1983 is generally sustainable in conjunction with Section 504"); *Meyerson v. Arizona*, 526 F. Supp. 129, 130 (D. Ariz. 1981) (if the plaintiff established a cause of action under Section 504 he would have a claim under Section 1983), *aff'd on other grounds*, 709 F.2d 1235 (9th Cir. 1983), *vacated on other grounds*, 465 U.S. 1095, 104 S. Ct. 1584 (1984); *Medley v. Ginsberg*, 492 F. Supp. 1294, 1303-04 (S.D. W. Va. 1980) ("there is little difficulty in concluding that [S]ection 1983 provides a remedy for the deprivation of federal statutory rights created by . . . [S]ection 504 of the Rehabilitation Act"); *Sanders v. Marquette Public Schools*, 561 F. Supp. 1361, 1373 (W.D. Mich. 1983) (Section 504 "does secure [the plaintiff] a right within the meaning of [S]ection 1983"); *Hutchings v. Erie City and County Library*, 516 F. Supp. 1265 (W.D. Pa. 1981) (allowing suit based on both Sections 1983 and 504).

[77] *See*, 463 U.S. at 635, 103 S. Ct. at 3250 (dissenting opinion of Justice Stevens, joined by Justices Brennan and Blackmun). Justices Powell and Burger disagreed. *See*, 463 U.S. at 610 n.3, 103 S. Ct. at 3237 n.3 (concurring opinion of Justice Powell).

IV. Injunctive Relief for Violations of Section 504

Injunctive relief is available for violations of Section 504 in appropriate circumstances.[78] A case on point is *Chalk v. United States District Court*,[79] in which the petitioner was a teacher who was transferred from his job teaching hearing-impaired students to an administrative position after he contracted AIDS. Chalk claimed that his transfer violated Section 504, and he requested a preliminary injunction ordering his reinstatement as a teacher. The district court denied the injunction. The Ninth Circuit, however, reversed the district court's decision and remanded the case with direction to enter an injunction ordering Chalk restored to his former job.

In determining whether the preliminary injunction had been wrongly denied in *Chalk*, the Ninth Circuit employed the traditional standards for ordering injunctive relief. The court first looked to whether Chalk had demonstrated probable success on the merits of his Section 504 claim. The court held that Chalk was likely to prevail on the merits, because Section 504 did not permit otherwise qualified persons to be discriminated against merely because they acquired contagious diseases.[80] The court next concluded that Chalk had made the required showing of irreparable harm. The major loss suffered by Chalk in being relocated was the enjoyment he received from his daily contact with children. The court held that this loss qualified as irreparable harm. Third, the court considered whether Chalk had an adequate remedy at law. The court concluded that "[the] plaintiff is not claiming future monetary injury; his injury is emotional and psychological—and immediate. Such an injury cannot be adequately compensated for by a monetary award after trial."[81] Finally, the court concluded that the balance of hardships weighed in favor of reinstating Chalk. The court recognized the shortage of knowledge about AIDS, but concluded that the chance of Chalk spreading AIDS by casual contact was remote.

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[78] Of course, injunctive relief is only appropriate when the defendant is currently receiving federal financial assistance; such relief may not be premised "on past funding." *Greater Los Angeles Council on Deafness v. Zolin*, 812 F.2d 1103, 1111, 1116 (9th Cir. 1987) (no injunctive relief permitted when "there was neither current, nor the likelihood of future, federal funding of the county court system").

[79] 840 F.2d 701 (9th Cir. 1988).

[80] 840 F.2d at 704-09 (discussing *School Board of Nassau County v. Arline*, 480 U.S. 273, 107 S. Ct. 1123 (1987)).

[81] 840 F.2d at 710. Similarly, in *Doe v. Dolton Elementary School District*, 694 F. Supp. 440, 447 (N.D. Ill. 1988), the court noted that *only* injunctive relief would assist the plaintiff. The plaintiff in that case was an elementary school student with AIDS who sought an injunctive ordering a school district to return him to his regular classes as a full-time student. The court cited *Chalk* in noting that "no amount of money would adequately compensate [the plaintiff] for the interim denial of his educational opportunities," and thus the plaintiff had no adequate remedy at law.

Another illustrative case discussing injunctive relief under Section 504 is *Kling v. County of Los Angeles.*[82] The plaintiff in *Kling* was originally denied admission to a nursing school because she had Crohn's disease. Kling sought an injunction ordering the school to admit her to the program. Although the district court refused to issue the order, the Ninth Circuit reversed and remanded with instructions to grant the injunction. While her case was being litigated, Kling attended another nursing school. After the case was remanded, the defendant nursing school offered her admission to its program. Kling declined the offer and opted, instead, to pursue her claim for damages. At that point, injunctive relief was of no help to Kling.[83]

V. Attorneys' Fees in Section 504 Cases

Two statutes are relevant in awarding attorneys' fees in Section 504 cases. The first, Section 505(b) of the Rehabilitation Act,[84] provides: "[i]n any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The second statute is Section 1988 of the Civil Rights Attorneys' Fees Awards Act, which contains identical language to Section 505(b).[85]

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[82] 769 F.2d 532 (9th Cir.), *rev'd on other grounds*, 474 U.S. 936, 106 S. Ct. 300 (1985).

[83] For other Section 504 cases discussing or awarding injunctive relief *see, e.g., Doe v. New York University*, 666 F.2d 761, 773 (2d Cir. 1981) (reversing district court's grant of mandatory injunction because plaintiff failed to show that forcing her to wait one year for admission to medical school caused irreparable harm); *Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1980) (affirming district court's preliminary injunction ordering defendants to provide interpreter for deaf student), *vacated on other grounds*, 451 U.S. 390, 101 S. Ct. 1930 (1981); *Nelson v. Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983) (holding injunctive relief proper when defendant refused to pay for readers for otherwise-qualified blind employees), *aff'd*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985); *Hutchings v. Erie City and County Library*, 516 F. Supp. 1265 (E.D. Pa. 1981) (claim for injunctive relief not mooted when library facilities were remodelled and made accessible to disabled people); *Lynch v. Maher*, 507 F. Supp. 1268 (D. Conn. 1981) (granting preliminary injunction mandating home-care services by state recipient of Medicaid for quadriplegic person); *Crawford v. University of North Carolina*, 440 F. Supp. 1047 (M.D. N.C. 1977) (granting injunction ordering university to provide interpreter or other means of making materials orally available to deaf student); *Delong v. Brumbaugh*, 703 F. Supp. 399 (W.D. Pa. 1989) (holding that exclusion of deaf woman from jury violated Section 504, but denying injunctive relief because the plaintiff failed to prove defendant received federal funding); *Ross v. Beaumont Hospital*, 678 F. Supp. 680 (E.D. Mich. 1988) (defendant's firing of surgeon violated Section 504, but court denied injunction ordering her reinstated because employment situation too volatile); *Ray v. School District of DeSoto County*, 666 F. Supp. 1524 (M.D. Fla. 1987) (granting injunction ordering school to readmit HIV-positive hemophiliac children to normal integrated school setting); *Local 1812, American Federation of Government Employees v. Department of State*, 662 F. Supp. 50 (D.D.C. 1987) (denying request for injunction barring State Department from testing employees for AIDS because plaintiff could not show sufficient likelihood of success on the merits); *Bolthouse v. Continental Wingate Company*, 656 F. Supp. 620 (W.D. Mich. 1987) (granting preliminary injunction ordering defendants to permit handicapped plaintiffs opportunities to rent HUD-subsidized housing); *Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 607 F. Supp. 175 (C.D. Cal. 1984) (denying injunctive relief because plaintiffs failed to show defendants received sufficient federal funding to justify injunction under Section 504), *aff'd in part and rev'd in part on other grounds*, 812 F.2d 1103 (9th Cir. 1987); *Pushkin v. Regents of University of Colorado*, 504 F. Supp. 1292 (D. Colo. 1981) (granting injunction ordering defendant to admit a student with multiple sclerosis to medical school's psychiatric residency program), *aff'd*, 658 F.2d 1372 (10th Cir. 1981).

[84] 29 U.S.C.A. §794a(2)(b) (1985).

A. Test for Attorneys' Fees

A two-pronged test must be satisfied before a prevailing party may recover attorneys' fees in a Section 504 action. That test is essentially the same under both Section 505(b) and Section 1988.[86] The first prong of the test involves a factual inquiry into the suit's objectives and a determination of whether the suit achieved them.[87] The second prong of the test involves a legal determination as to whether the relief granted was mandated by law or constituted a mere gratuitous gesture—not compelled by law—on the part of the defendant.[88]

The factual inquiry essentially compares the relief the plaintiff requested with the relief the plaintiff ultimately obtained. The plaintiff need not obtain full recovery of all relief sought to be entitled to attorneys' fees; it is sufficient that the plaintiff prevail on some part of his or her claim or receive some part of the relief requested.[89] The purpose behind this policy is to award fees liberally as an incentive to encourage plaintiffs to seek to vindicate their rights under Section 504.[90] Thus, when making this factual inquiry, courts take a "practical approach" and look to whether the plaintiff's efforts "contributed in a significant way" to winning the benefits sought in the suit.[91]

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[85] 42 U.S.C.A. §1988 (1981) provides in pertinent part:

> In any action or proceeding to enforce a provision of . . . [T]itle VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

[86] *See, e.g., Disabled in Action v. Pierce,* 789 F.2d 1016, 1018 (3d Cir. 1986) (test under Section 505(b) same as under Section 1988); *Pomerantz v. County of Los Angeles,* 674 F.2d 1288, 1292-93 (9th Cir. 1982) (test under Section 505(b) same as under Section 1988); *Jones v. Illinois Department of Rehabilitation Services,* 689 F.2d 724, 730 n.8 (7th Cir. 1982) ("Section [505] fee awards are governed by the same considerations controlling in [Section] 1988 actions").

[87] *Greater Los Angeles Council on Deafness (GLAD) v. Community Television of Southern California,* 813 F.2d 217, 219-20 (9th Cir. 1987). *See also, Texas State Teachers Association v. Garland Independent School District,* ______ U.S. ______, 109 S. Ct. 1486 (1989); *Hensley v. Eckerhart,* 461 U.S. 424, 103. S. Ct. 1933 (1983).

[88] *GLAD,* 813 F.2d at 220.

[89] *See, e.g., GLAD,* 813 F.2d at 220 (to be a prevailing party "[p]laintiffs need only have received some of the benefits they sought in the suit"); *Durett v. Cohen,* 790 F.2d 360, 362 (3d Cir. 1986) ("[a] plaintiff prevails if s/he achieves 'some of the benefit sought' in the suit") (citation omitted).

[90] *See, e.g., Durett,* 790 F.2d at 363 (". . . the policy of encouraging civil rights plaintiffs to bring actions to vindicate their . . . rights which underpins the attorneys' fee statute").

[91] *See, e.g., Disabled in Action v. Baltimore,* 685 F.2d 881, 885 (4th Cir. 1982) (adopting the practical approach analysis).

A plaintiff may be entitled to fees under this practical approach even when the case settles prior to the court's entry of a dispositive ruling.[92] Once a case has settled, however, it may be more difficult to show the causal connection between the lawsuit and the ultimate relief necessary for the purpose of recovering attorneys' fees. In *Disabled in Action v. Pierce*,[93] for instance, plaintiffs challenged a plan by the Department of Housing and Urban Development to move into new office space. The suit alleged that handicapped persons were denied equal access to the office space because it was not wheelchair accessible, the doors were too difficult for disabled persons to open, and the buttons on elevators were too high for persons in wheelchairs to reach. After the trial court denied a motion to dismiss for failure to state a claim, the parties entered into a settlement agreement. Plaintiffs then filed a petition for fees, which the government opposed.

The trial court in *Pierce* denied the plaintiffs' fee petition. On appeal, the Third Circuit reversed, holding that the settlement did not preclude relief, but was instead merely one factor to be considered in determining whether a causal relationship existed between the suit and the relief. The Third Circuit held that the suit need not be the only factor in motivating the relief, but merely a material one. The court found that the suit in *Pierce* was a material factor in motivating the relief, reversed the trial court's denial of fees and remanded the case for a fee award.[94]

It has also been held that a plaintiff in a Section 504 action may recover attorneys' fees even if the merits of the claim are determined in an administrative proceeding. In *Watson v. Veterans Administration*[95] the court stated that administrative agencies have authority under Section 505(b) to grant fees to the party prevailing in the administrative action.[96] At least one court has held, however, that a plaintiff cannot settle a claim with an agency in state court and subsequently bring a claim for fees in federal court.[97] This limitation applies even where the plaintiff prevailed in state court on facts that would have entitled him to relief under Section 504.[98]

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[92] *See, e.g., United Handicapped Federation v. Andre*, 622 F.2d 342, 347 (8th Cir. 1980) (award of attorneys' fees was proper even though case settled, because the suit motivated the defendant to devote much greater time and attention to developing handicapped transportation project); *Heyer v. New York City Housing Authority*, No. 80 CIV 1196 (RWS), slip op. (S.D.N.Y. August 3, 1983) (available on Lexis genfed library) ("[t]he fact that relief has been obtained through settlement rather than through full litigation does not affect the determination of whether a party has prevailed").

[93] 789 F.2d 1016 (3d Cir. 1986).

[94] *See also, Child v. Spillane*, 866 F.2d 691, 692-93 (4th Cir. 1989). In that case the court noted that a Section 504 plaintiff may be a prevailing party "by virtue of a voluntary action by the opposing party through settlement or a consent degree," and that "[t]he fact that a settlement has been reached as compared to a formal judgment does not mandate a stricter test for entitlement [to fees]." The court held, however, that no causal nexus existed between the litigation and the relief obtained. The court stated that the institution of the plaintiff's lawsuit was unnecessary, since the defendants had already initiated the process to determine whether the plaintiff, a school child with AIDS, could be readmitted to school on an expedited basis. Further, the court noted that the school district's decision to readmit would have been rendered even sooner if the plaintiff had made timely delivery of requested medical records.

[95] 24 Fair Empl. Prac. Cas. (BNA) 431 (C.D. Cal. 1980).

At least one court has entertained an action for attorneys' fees even when the underlying claim for relief was held to be moot. In *Doe v. Marshall*[99] the plaintiff requested an injunction to allow her handicapped son to play high school football. The court granted a temporary injunction, and the school district appealed. In the meantime, the student graduated from high school, rendering the appeal on the injunction moot. The court nonetheless remanded the case for a determination of attorneys' fees, holding that the plaintiff's right to fees turned on whether she was a prevailing party, not on whether the controversy remained a live one.

The second prong of the attorneys' fee test involves a determination of whether the relief was obtained as a result of the plaintiff's action or via a mere gratuitous act on the part of the defendant.[100] In this regard, it must be shown that there was a causal nexus between the plaintiff's suit and the ultimate relief obtained.[101] An example of a gratuitous act—and thus the lack of a causal connection—occurred in *California Association of Physically Handicapped (CAPH) v. Federal Communications Commission (FCC)*.[102] In that case, CAPH requested that the FCC include handicapped persons in its equal employment opportunity policies, and that the FCC give preference to handicapped persons with respect to the ownership and management of broadcast licenses. The FCC considered the requests but declined to adopt them; it did, however, appoint a "coordinator for broadcasting and the handicapped."[103] While the FCC was reviewing the petition, CAPH filed suit against the FCC and Columbia Broadcasting System (CBS), seeking essentially the same relief as stated in the petition before the FCC. When the FCC filed its report and policies in response to the petition, the district court dismissed the case. That court also denied an application for fees. On appeal, the Ninth Circuit affirmed, holding that the only relief resulting from CAPH's legal action was the FCC's appointment of a coordinator, and that the coordinator was appointed via a mere gratuitous act not required by law. Thus the Ninth Circuit held that the district court had properly denied plaintiff's petition for fees.[104]

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[96] *See also, Laughlin v. School District No. 1, Multnomah County*, 686 P.2d 385 (Or. App.), *reconsidered and adhered to*, 689 P.2d 334 (Or. App. 1984) (prevailing party in an action under Section 504 would be entitled to attorneys' fees even if the parties settled at the administrative agency level, since Congress did not intend to condition the availability of attorneys' fees on the stage of the proceedings at which the protection of rights under Section 504 is sought).

[97] *Carrero v. New York City Housing Authority*, 45 Fair Empl. Prac. Cas. (BNA) 649 (S.D.N.Y. 1987).

[98] *Id.*

[99] 622 F.2d 118 (5th Cir. 1980), *cert. denied*, 451 U.S. 993 (1981). *See also, Doe v. Marshall*, 694 F.2d 1038 (5th Cir.) (affirming the award of attorneys' fees by the district court on remand), *cert. denied*, 462 U.S. 1119 (1983).

[100] *See, e.g., Greater Los Angeles Council on Deafness (GLAD) v. Community Television of Southern California*, 813 F.2d 217, 220 (9th Cir. 1987).

[101] *See, e.g., GLAD*, 813 F.2d at 220 (there must be " 'some sort of clear, *causal relationship* between the litigation brought and the practical outcome realized' ") (citation omitted, emphasis in original); *Durett*, 790 F.2d at 362 (in an action for attorneys' fees it must be determined "whether [the] plaintiff has shown a causal connection between the litigation and the relief obtained from the defendant").

[102] 721 F.2d 667, 672 (9th Cir. 1983), *cert. denied*, 469 U.S. 832 (1984).

In most cases, however, the second part of the fee test is not so difficult for plaintiffs to establish. In *Greater Los Angeles Council on Deafness (GLAD) v. Community Television of Southern California*,[105] for example, the court held that plaintiffs had satisfied the test when part of the case established that broadcasters were obligated to comply with Section 504. Although the plaintiffs did not win a final judgment on the merits, they accomplished their objective of forcing the local public television station to transmit with captions any closed-caption programs it received from the Department of Education. The plaintiffs also accomplished their objective of forcing public television stations to comply with Section 504. The Ninth Circuit accordingly affirmed the grant of attorneys' fees to GLAD.

Another illustrative case dealing with the second prong of the attorneys' fee test is *United Handicapped Federation v. Andre*.[106] In that case, the effect of the plaintiffs' suit was to force the Minneapolis and St. Paul Metropolitan Transit Commission (MTC) to consider a resolution calling for expanded MTC services to handicapped persons. Even though the *defendants* in that case were granted summary judgment on all legal claims involved, the court held that the *plaintiffs* were entitled to attorneys' fees.[107] The court reasoned that the case had hastened local action with respect to the provision of transportation for handicapped people and had established that local authorities owed a duty "to provide adequate transportation to the handicapped."[108]

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[103] 721 F.2d at 669.

[104] *See also, Pomerantz v. County of Los Angeles*, 674 F.2d 1288, 1292-93 (9th Cir. 1982) (where the State of California decided to eliminate a rule disqualifying blind persons from serving as jurors independently of the plaintiffs' Section 504 lawsuit, plaintiffs were not prevailing parties who could be awarded attorneys' fees).

[105] 813 F.2d 217 (9th Cir. 1987).

[106] 622 F.2d 342 (8th Cir. 1980).

[107] 622 F.2d at 345-47.

[108] 622 F.2d at 347.

In finding that the plaintiffs' case satisfied the second part of the attorneys' fee test, the Eighth Circuit in *Andre* drew on the Supreme Court's reasoning in *Newman v. Piggie Park Industries.*[109] In *Piggie Park*, the Court held that attorneys' fees should be awarded to plaintiffs in actions under the 1964 Civil Rights Act "unless special circumstances would render such an award unjust."[110] In the opinion of the authors, the standard applied by the Eighth Circuit in *Andre* comports with Section 505(b)'s purpose of encouraging private enforcement actions.[111]

B. Measure of Attorneys' Fees

Once it is determined that a plaintiff is entitled to an award of attorneys' fees under Section 504, the next step is to determine the *amount* of the fees to be awarded. The process of measuring the appropriate award of fees is somewhat complicated, but the Ninth Circuit's explanation in *GLAD* helps to clarify the issue. According to the Ninth Circuit, the starting point in the measuring process is the "lodestar" figure, which is the number of hours reasonably spent working on an issue multiplied by a reasonable hourly rate.[112] The basic lodestar figure may then be increased by a "multiplier," which accounts for peculiar aspects of a particular case, including its complexity, the novelty of issues to be resolved and other factors.[113]

In the opinion of the Ninth Circuit, at least, courts are also to consider the degree of the plaintiff's success when determining the amount of attorneys' fees.[114] This may involve a complicated examination, because a court may properly limit fees to work performed by the attorney(s) on only those claims on which the plaintiff succeeded.[115] At least one court has held, however, that a plaintiff need not succeed on a claim in its entirety in order to recover fees for that claim, because such a limitation would deter creative litigation.[116] The amount of fees to be awarded in such a case is in the trial court's discretion.[117] Moreover, it has been held that plaintiffs are entitled to full recovery of fees incurred for time spent when defendants appeal from a fee award, even if the original fee award is reduced.[118] The Ninth Circuit reasoned in *GLAD* that an appeal from an award of fees involves a single issue and should not be apportioned.[119]

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[109] 390 U.S. 400, 88 S. Ct. 964 (1986).

[110] 390 U.S. at 402, 88 S. Ct. at 966.

[111] For other Section 504 cases discussing the attorneys' fee issue, *see, e.g., Tatro v. Texas*, 703 F.2d 823, 833 (5th Cir. 1983) (because the Texas Board of Education took action that had the effect of denying the benefits of a federally funded program to a disabled school child, the Board's action "violated [S]ection 504 and supported an award of attorneys' fees under [S]ection 505"); *Perez v. Philadelphia Housing Authority*, 677 F. Supp. 357, 361 (E.D. Pa. 1987) (because the plaintiff's job was restored as a result of her Section 504 lawsuit, the plaintiff was a prevailing party and entitled to an award of attorneys' fees), *aff'd mem.*, 841 F.2d 1120 (3d Cir. 1988); *N.A.A.C.P. v. Wilmington Medical Center, Inc.*, 530 F. Supp. 1018, 1022-24 (D. Del. 1981) (plaintiffs who did not succeed on the merits of any part of their discrimination claims under Title VI and Section 504 were not prevailing parties even though they succeeded in establishing their right to assert a private cause of action under those Acts), *rev'd on other grounds*, 693 F.2d 22 (3d Cir. 1982), *cert. denied*, 460 U.S. 1052 (1983); *Pushkin v. Regents of the University of Colorado*, 504 F. Supp. 1292, 1299-1300 (D. Colo. 1981) (noting that as the prevailing party in a Section 504 action the plaintiff was entitled to attorneys' fees, and stating that "I would award attorney fees in excess of the amount claimed . . . [but the] plaintiff entered into a fee agreement which is fair and reasonable . . . [albeit] below the current market . . ."), *aff'd*, 658 F.2d 1372 (10th Cir. 1981).

[112] *GLAD*, 813 F.2d at 221. *Accord, Fells v. Brooks*, 522 F. Supp. 30, 34 (D.D.C. 1981); *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980).

[113] *Id.*

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[114] 813 F.2d at 222.

[115] *Id.*

[116] *See e.g., Disabled in Action v. Baltimore*, 685 F.2d 881, 885 (4th Cir. 1982) (court properly awarded attorneys' fees in connection with attempting to obtain a temporary restraining order even though the plaintiffs were unsuccessful in obtaining the order).

[117] *Id.*

[118] *GLAD*, 813 F.2d at 223.

[119] *Id.* For a discussion of attorneys' fees in the context of the Education for All Handicapped Children Act, *see* chapter 17 of this text, *infra*. That discussion covers points that may be equally relevant to claims for attorneys' fees under Section 504.

9

Sections 501 and 503 of the Rehabilitation Act

I. Section 501 of the Rehabilitation Act

A. Introduction

Section 501 of the Rehabilitation Act[1] establishes a federal Interagency Committee on Handicapped Employees, whose purposes and functions are

> (1) to provide a focus for Federal and other employment of handicapped individuals, and to review, on a periodic basis, in cooperation with the Office of Personnel Management, the adequacy of hiring, placement, and advancement practices with respect to handicapped individuals, by each department, agency, and instrumentality in the executive branch of Government, and to insure that the special needs of such individuals are being met; and (2) to consult with the Office of Personnel Management to assist the Office to carry out its responsibilities under subsections (b), (c), and (d) of this section.[2]

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[1] 29 U.S.C.A. §791 (1985 and West Supp. 1990).

[2] *Id.* The Committee is to be

> comprised of such members as the President may select, including the following (or their designees whose positions are Executive Level IV or higher): the Chairman of the Office of Personnel Management, the Administrator of Veterans' Affairs, and the Secretaries of Labor and Education and Health and Human Services. The Secretary of Education and the Chairman of the Office of Personnel Management shall serve as co-chairmen of the Committee.

Id.

On the basis of its review and consultation the Committee must "periodically make to the Office of Personnel Management such recommendations for legislative and administrative changes as it deems

Subsection (b) of Section 501 requires federal agencies to establish affirmative action plans for the hiring, placement and advancement of handicapped individuals; subsection (c) requires the Office of Personnel Management (OPM) to develop policies and procedures for state agencies to follow to facilitate the hiring, placement and employment of handicapped individuals; subsection (d) requires the OPM to submit yearly reports to Congress with respect to the practices of and achievements in the hiring, placement and employment of handicapped persons in all federal agencies.[3]

The hub of Section 501 is subsection (b), which requires all federal agencies to submit affirmative action plans for the "hiring, placement, and advancement of handicapped individuals." This section was enacted in 1973 to make it clear that "the Federal Government must be an equal opportunity employer, and that this equal opportunity must apply fully to handicapped individuals."[4] Congress's purpose in enacting Section 501 was "to require that the Federal Government itself act as the model employer of the handicapped and take affirmative action to hire and promote the disabled."[5]

Notwithstanding the broad legislative purpose underlying Section 501, that Section as enacted did not expressly prohibit the federal government from discriminating against disabled employees or applicants. Rather, Section 501 merely required submission of affirmative action plans (unlike Section 504 which expressly prohibited discrimination against handicapped persons by recipients of federal financial assistance). Moreover, Section 501, as initially enacted, did not provide an express remedy for federal employees or applicants for federal jobs who claimed that they were discriminated against on the basis of handicap. Thus, many courts ruled that Section 501 neither expressly nor impliedly created a private right of action against a federal agency that allegedly violated the Act.[6]

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necessary or desirable." *Id.* In turn, the Office of Personnel Management is required to "timely transmit to the appropriate committees of Congress any such recommendations." *Id.*

[3] For the full text of subsections (b)(c) and (d), *see* appendix D of this text, *infra*.

[4] S. Rep. No. 93-318, 93d Cong., 1st Sess. at 49 (1973), *U.S. Code Cong. and Admin. News* 2076, 2122 (1973).

[5] Rehabilitation of the Handicapped Programs 1976: Hearings Before the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare, 94th Cong., 2d Sess. at 1502 (1976) (remarks of Senator Williams).

[6] *See, e.g., Prewitt v. U.S. Postal Services*, 662 F.2d 292, 302 (5th Cir. 1981) (explaining that "[u]nder the original 1973 Rehabilitation Act, a private cause of action founded on handicap discrimination was not recognized upon Section 501 as against a federal government employer; the literal statutory wording merely required federal agencies to *submit* affirmative action plans") (emphasis in original); *Counts v. U.S. Postal Service*, 17 Fair Empl. Prac. Cas. (BNA) 1161, 1165 (N.D. Fla. 1978), *rev'd due to statutory changes*, 631 F.2d 46 (5th Cir. 1980); *Coleman v. Darden*, 15 Fair Empl. Prac. Cas. (BNA) 272, 273 (D. Colo. 1977), *aff'd*, 595 F.2d 533 (10th Cir.), *cert. denied*, 444 U.S. 927 (1979); *Smith v. U.S. Postal Service*, 742 F.2d 257, 259 (6th Cir. 1984) (noting that the courts did not recognize the original Rehabilitation Act as creating a private right of action for federal employees).

And, while Section 504 *was* held to imply a private right of action,[7] employees of federal agencies were held not to be protected under Section 504 because federal agencies were not viewed as programs or activities that received federal financial assistance.[8] Moreover, the Act did not expressly provide any authority for the promulgation of regulations to define the duties of federal employers under Section 501. Thus, in 1978 Congress amended the Rehabilitation Act to correct the inadequacies in Section 501.

First, Congress amended Section 504 of the Rehabilitation Act specifically to encompass programs and activities conducted by federal agencies.[9] Second, Congress amended Section 504 to require federal agencies to draft regulations to carry out the non-discrimination mandate.[10] Finally, Congress added a remedies provision to the Rehabilitation Act, Section 505(a),[11] which provides, *inter alia*, that any federal employee or job applicant who has a complaint against a federal employer under Section 501 is entitled to the same rights and remedies provided by Title VII of the Civil Rights Act of 1964.[12] The Senate Committee on Human Resources explained one purpose of Section 505(a) as follows:

> The committee believes now as it did in 1973 that the Federal Government must be "an equal opportunity employer." The amendment to Section 501 will aid in attaining that goal by providing for individuals aggrieved on the basis of their handicap the same rights, procedures, and remedies provided individuals aggrieved on the basis of race, creed, color, or national origin. . . . Further, application of the Title VII provisions makes specific the right to bring a private right of action with respect to [S]ection 501, subject, of course, to the provision for exhaustion of administrative remedies and other rules and procedures set forth in title VII.[13]

Following these amendments, federal employees and applicants for federal jobs were protected against discrimination on the basis of disability.

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[7] *See* chapter 3 of this text, *supra*.

[8] *See, e.g., Coleman v. Darden*, 595 F.2d 533, 538-39 (10th Cir.), *cert. denied*, 444 U.S. 927 (1979).

[9] 29 U.S.C.A. §794 (1985 and West Supp. 1990), as amended in 1978, prohibits discrimination "under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service."

[10] 29 U.S.C.A. §794 (1985 and West Supp. 1990), as amended in 1978, provides that "[t]he heads of each such agency shall promulgate such regulations as may be necessary to carry out the amendments of this section. . . ." Further, that section requires federal agencies to submit such regulations to Congress. *See* note 1 of chapter 3 of this text, *supra*.

[11] 29 U.S.C.A. §794a (1985 and West Supp. 1990).

[12] Title VII is codified at 42 U.S.C.A. §2000e-17 (1981).

[13] S. Rep. No. 95-890, 95th Cong., 2d Sess. at 18-19 (1978). *See also, Cong. Rec.* §15591 (daily ed. Sept. 20, 1978) (remarks of Senator Cranston).

B. Procedural Issues

1. Private Right of Action

As previously noted, Section 505(a) of the Rehabilitation Act provides that an individual has a private right of action under Section 501 against a federal employer.[14]

2. Exhaustion of Administrative Remedies

Prior to filing suit under Section 501, an individual is required to exhaust his or her administrative remedies under that Act.[15] The administrative procedures that must be followed are those set forth under Title VII of the Civil Rights Act.[16] Basically, those procedures are as follows:

An employee or applicant who feels that he or she has been discriminated against on the basis of handicap by a federal employer must file a complaint within 30 days of the discriminatory act[17] with the federal agency that engaged in the subject conduct.[18] If the complainant is not satisfied with the agency's resolution of the dispute, he or she may appeal the agency's decision to the Equal Employment Opportunity Commission (EEOC). Alternatively, within 30 days of receipt of notice of the agency's final decision the complainant may file suit in federal district court without appealing to the EEOC.[19] If the complainant does appeal to the EEOC he or she may file suit in federal court within 30 days of the EEOC's final decision.[20] In any event, if the agency or the EEOC has not taken final action within 180 days after the filing of the complaint, the complainant may file a civil action in federal district court at the expiration of that 180-day period.[21]

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[14] This provision is routinely enforced by the courts. *See, e.g., Prewitt v. U.S. Postal Service*, 662 F.2d 292 (5th Cir. 1981).

[15] *See, e.g., McGuinness v. U.S. Postal Service*, 744 F.2d 1318 (7th Cir. 1984); *Prewitt v. U.S. Postal Service*, 662 F.2d 292 (5th Cir. 1981); *American Postal Workers Union v. U.S. Postal Service*, 650 F. Supp. 828 (E.D. Pa 1986); *Treadwell v. Alexander*, 27 Fair Empl. Prac. Cas. (BNA) 543 (S.D. Ga. 1981), *aff'd*, 707 F.2d 473 (11th Cir. 1983); *Clark v. U.S. Postal Service*, 592 F. Supp. 631 (D. Mass. 1984), *White v. Frank*, 718 F. Supp. 592 (W.D. Tex. 1989), *aff'd*, 895 F.2d 243 (5th Cir. 1990).

[16] 42 U.S.C.A. §2000e-16 (1981). [29 U.S.C. §794(a) provides that the remedies, procedures and rights set forth in 42 U.S.C. §§2000e-5(e) and 2000e-16 shall apply to actions arising under Section 501.]

[17] 29 C.F.R. §1613.214 (a)(1)(i) (1989).

[18] 42 U.S.C.A. §2000e-16(c) (1981). That complaint is generally filed with the agency's Equal Employment Opportunity (EEO) counselor.

[19] *Id.*

[20] *Id.* In *Rys v. U.S. Postal Service*, 886 F.2d 443 (1st Cir. 1989), the court affirmed the dismissal of an action under Section 501 due to the plaintiff's failure to name the appropriate official agency or department head as the defendant. The plaintiff in that case filed an action claiming employment discrimination under Section 501, and named the United States Postal Service and three local postal employees as defendants. The district court dismissed the case because the plaintiff had not named the Postmaster General as a defendant. In affirming the district court's opinion, the First Circuit stated that the Postmaster General was the only statutorily authorized defendant, and that the plaintiff had neither

3. Right to Jury Trial

At least one court has held that there is no right to a jury trial under Section 501. In *George v. Brock*[22] the court stated as follows:

> It is undisputed that Title VII authorizes only equitable remedies. Consequently, there is no right to a jury trial under Title VII. . . . Thus, when Congress provided that individuals who sue under Section 501 . . . are entitled to the remedies, procedures and rights of Title VII, it was clear that only equitable relief and a bench trial would be available.[23]

4. Judicial Review of Agency Action

An individual who seeks judicial review of the action taken at the administrative level under Section 501 is entitled to *de novo* consideration of his or her discrimination claim by the federal district court.[24] As the Fifth Circuit stated in *Prewitt v. United States Postal Service:*

> Once administrative remedies have been exhausted . . . an individual is entitled to *de novo* consideration of his discrimination claims in the district court; however, prior administrative findings made with respect to an employment discrimination claim may be admitted into evidence at the trial *de novo*.[25]

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named nor served the Postmaster General within the 30-day limitation period. Thus, the First Circuit held that the district court properly refused to allow the plaintiff to untimely amend his complaint to add the Postmaster General as a defendant.

[21] *Id. See also, Brown v. General Services Administration*, 425 U.S. 820, 832, 96 S. Ct. 1961, 1967 (1976) (discussing the application of 2000e-16(c) in the context of a Title VII case). The complainant may, of course, elect not to file an action in federal district court after expiration of the 180-day period, but choose instead to allow the administrative proceedings to take their natural course, regardless of how long those proceedings take. In that case the complainant may file a civil action in federal court within 30 days of receipt of notice of the final action taken by the administrative agency, or again, may file an appeal of the agency's action with the EEOC and file a civil action in federal court after receiving the EEOC's final decision. Where a federal agency has engaged—or is engaging—in a "continuing violation" of Section 501, however, by engaging in a "continuing pattern" of discrimination, the EEOC and the courts may consider allegedly discriminating acts occurring *prior to* the 180-day period, and courts may consider alleged discriminatory acts occurring during the time that the plaintiff's charge is pending before the EEOC. *See, e.g., Gardner v. Morris*, 752 F.2d 1271, 1279 (8th Cir. 1985).

[22] No. 86-6794, slip op. (E.D. Pa. August 21, 1987)(available on Lexis genfed library).

[23] Slip op. at 2.

[24] In other words, the federal district court is obligated to review all evidence anew.

[25] 662 F.2d 292, 303 (5th Cir. 1981) (citing *Chandler v. Roudebush*, 425 U.S. 840, 863-64, 96 S. Ct. 1949, 1960-61 (1976)). *See also, Shirey v. Devine*, 670 F.2d 1188, 1198 (D.C. Cir. 1982) (stating that

5. Relationship Between Sections 501 and 504

While both Sections 501 and 504 prohibit federal agencies from discriminating on the basis of handicap, the courts are in some disagreement as to whether an individual may sue a federal agency under *both* Sections 501 and 504. Some courts have allowed individuals to file actions under both Sections.[26] As stated by the Fifth Circuit, the reason for so holding is that " '[w]hen there are two acts upon the same subject, the rule is to give effect to both if possible.' "[27] Other courts have held that individuals may sue federal agencies under only one federal law—Section 501.[28] In practical terms this distinction makes little difference. Clearly, when an individual files suit under both Sections 501 and 504 he or she must first exhaust the Section 501 administrative remedies.[29] Thus, there is no real advantage to being able to assert causes of action under both Sections 504 *and* 501, since Section 504 contains no greater substantive requirements than Section 501.[30]

6. Burdens of Proof Under Section 501

The same issues and concerns raised with respect to burdens of proof under Section 504[31] are also raised with respect to burdens of proof under Section 501. Because the rights, remedies and procedures set forth in Title VII of the Civil Rights Act apply to Section 501,[32] however, several courts have held that the applicable burdens of proof under Section 501 are those applied in Title VII

"Section 505 contemplates that courts will stand on equal footing with administrative authorities in defining and fashioning affirmative action plans [under Section 501]"; and explaining, *inter alia*, that "independent judicial definition of the terms of Section 501 is consistent with common sense and good policy"); *Mantolete v. Bolger*, 767 F.2d 1416, 1423 (9th Cir. 1985) ("the determination of whether the employer violated [Section] 501 is to be made by the trial court *de novo*").

[26] *See, e.g., Milbert v. Koop*, 830 F.2d 354 (D.C. Cir. 1987); *Smith v. U.S. Postal Services*, 742 F.2d 257, 262 (6th Cir. 1984); *Prewitt v. U.S. Postal Service*, 662 F.2d 292, 304 (5th Cir. 1984); *De la Torres v. Bolger*, 781 F.2d 1134, 1135 (5th Cir. 1986); *Gardner v. Morris*, 752 F.2d 1271, 1277-78 (8th Cir. 1985).

[27] *Prewitt v. U.S. Postal Service*, 662 F.2d 292, 304 (5th Cir. 1984).

[28] *See, e.g., Corbett v. Carlin*, 804 F.2d 145 (9th Cir. 1986), *cert. denied*, 482 U.S. 905 (1987); *Boyd v. U.S. Postal Service*, 752 F.2d 410, 413 (9th Cir. 1985); *McGuinness v. U.S. Postal Service*, 744 F.2d 1318, 1321 (7th Cir. 1984); *Di Pompo v. West Point Military Academy*, 708 F. Supp. 540, 544 (S.D.N.Y. 1989).

No court has held that an individual should sue a federal agency under just Section 504, for the obvious reasons that: (1) Section 501 is more specifically addressed to federal agencies, and (2) Section 501 contains an affirmative action requirement while Section 504 does not.

[29] *See* section II(B) of chapter 3 of this text, *supra*.

[30] It should be noted that at least one court has held that neither Section 501 nor Section 504 applies to uniformed members of the armed forces. *Doe v. Ball*, 725 F. Supp. 1210 (M.D. Fla. 1989) *aff'd sub nom., Doe v. Garrett*, 903 F.2d 1455 (11th Cir. 1990).

[31] *See* chapter 3 of this text, *supra*.

[32] 29 U.S.C.A. §794a (1985 and West Supp. 1990).

cases.[33] Under this general standard, the plaintiff must establish a *prima facie*[34] case by showing that: (1) he or she is handicapped within the meaning of Section 501; (2) he or she applied for and was denied a job or promotion, or was terminated or demoted from a position, by a federal agency; (3) he or she was qualified for the job except for the handicap; (4) at least as a facial matter, he or she can perform the essential functions of the job either with or without the provision of reasonable accommodations (without endangering the health or safety of himself or herself or others). The burden then shifts to the federal agency to disprove any of the elements of the plaintiff's *prima facie* case or to show that accommodating the plaintiff would impose an undue hardship on the operation of its program (or would not meet the safety test) The plaintiff bears the ultimate burden of showing that the agency's proffered reasons are merely pretextual.

At least one court, however, has applied the Section 504 burden-of-proof test set forth by the Tenth Circuit in *Pushkin v. Regents of the University of Colorado*[35] in a Section 501 action. In *Hurst v. United States Postal Service*[36] the court followed *Pushkin* in stating, in an action arising under Section 501, that:

> Generally, a plaintiff in a handicap discrimination case must establish a prima facie case by showing that he was an "otherwise qualified handicapped individual" as defined by the Act and that he was rejected under circumstances giving rise to the inference that his rejection was based solely on his handicap. The defendant then has the burden of going forward and proving that the plaintiff was not an otherwise qualified handicapped individual or that his rejection . . . was for reasons other than his handicap.[37]

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[33] *See, e.g., Guinn v. Bolger*, 598 F. Supp. 196, 200 (D.D.C. 1984) (holding that Title VII burdens of proof apply in actions under both Sections 501 and 504); *Mantolete v. Bolger*, 96 F.R.D. 179, 182 (D. Ariz. 1982) (Title VII burdens of proof apply in Section 501 actions), *aff'd in part and rev'd in part on other grounds*, 767 F.2d 1416 (9th Cir. 1985); *Guerriero v. Schultz*, 557 F. Supp. 511, 513 (D.D.C. 1983) (Title VII burdens of proof apply in actions under both Sections 501 and 504); *Prewitt v. U.S. Postal Service*, 662 F.2d 292, 308-10 (5th Cir. 1981) (Title VII burdens of proof apply in actions under both Sections 501 and 504); *Bey v. Bolger*, 540 F. Supp. 910, 924-25 (E.D. Pa. 1982) (Title VII burdens of proof apply in actions under both Sections 501 and 504); *Gardner v. Morris*, 752 F.2d 1271, 1279-81 (8th Cir. 1985) (Title VII burdens of proof apply in Section 501 actions); *Treadwell v. Alexander*, 707 F.2d 473, 475 (11th Cir. 1983) (Title VII burdens of proof apply in actions under both Sections 501 and 504); *Dexler v. Tisch*, 660 F. Supp. 1418, 1427 (D. Conn. 1987) (Title VII burdens of proof apply in Section 501 actions); *Davis v. Frank*, 711 F. Supp. 447, 453 (N.D. Ill. 1989) ("[t]he burdens of proof and persuasion in cases brought under the Rehabilitation Act are generally modeled after those developed under Title VII case law").

[34] A *prima facie* case is one that is established until contradicted and overcome by other evidence.

[35] 658 F.2d 1372 (10th Cir. 1981). For a discussion of the distinction between the *Pushkin* approach and the Title VII approach *see* chapter 3 of this text, *supra*.

[36] 653 F. Supp. 259 (N.D. Ga. 1986).

[37] 653 F. Supp. at 261.

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C. The Section 501 Regulations

Although Section 501 was enacted in 1973, it was not until 1978 that regulations addressing the issue of discrimination on the basis of handicap by federal agencies were promulgated by the now defunct Civil Service Commission.[38] Currently, those regulations are administered by the EEOC. The EEOC regulations require each federal agency to establish and implement regulations pertaining to the employment of handicapped persons in accordance with basic guidelines set forth by the EEOC.[39] Basically, the EEOC regulations set forth "the policy under which an agency shall establish a continuing program to assure nondiscrimination on account of physical or mental handicap and the regulations under which an agency will process complaints of discrimination based on a physical or mental handicap."[40]

The EEOC Section 501 regulations set forth relevant definitions pertaining to qualified handicapped individuals that are almost identical to the definitions contained in the DOE, DHHS, DOL and DOJ Section 504 regulations.[41] The EEOC Section 501 regulations also follow a similar path as that followed by the Section 504 regulations with respect to the provision of reasonable accommodations for handicapped persons,[42] with respect to the use of employment tests or criteria,[43] and with respect to pre-employment inquiries.[44] The EEOC Section 501 regulations differ from the Section 504 regulations by further providing that "[t]he Federal Government shall become a model employer of handicapped individuals."[45] Finally, the EEOC Section 501 regulations provide instructions for federal agencies to follow in drafting their respective regulations "governing the acceptance and processing of complaints of discrimination based on a physical or mental handicap."[46]

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[38] 5 C.F.R. §§713.701-.710 (1978) (now 29 C.F.R. §§1613.701-.710 (1989)).

[39] 29 C.F.R. §1613.708 (1989). The basic guidelines are set forth at 29 C.F.R. §§1613.701-.709 (1989).

Although the EEOC regulations became effective on January 1, 1979, it was not until April 1983 that the Department of Justice (DOJ) distributed a prototype regulation to be followed by programs conducted by federal agencies. [Prototype Regulation Agency's Name/CFR cite/Enforcement of Nondiscrimination on the Basis of Handicap in/Agency Name/Programs, Developed by the United States Department of Justice (April 15, 1983)]. While the DOJ's prototype regulation was developed pursuant to Section 504 of the Rehabilitation Act [29 U.S.C. §794], rather than pursuant to Section 501, because both Sections 501 and 504 prohibit discrimination on the basis of handicap by federal agencies the DOJ Section 504 regulations also refer to Section 501.

[40] 29 C.F.R. §1613.701(a) (1989).

[41] 29 C.F.R. §1613.703 (1989). For an explanation of the Section 504 definitions, *see* chapter 5 of this text, *supra*.

[42] 29 C.F.R. §1613.704 (1989). For an explanation of the Section 504 regulations dealing with the provision of reasonable accommodations *see* chapter 5 of this text, *supra*.

[43] 29 C.F.R. §1613.705 (1989). For an explanation of the Section 504 regulations dealing with employment tests or criteria *see* chapter 6 of this text, *supra*.

A case addressing the issue of whether physical standards for employment were sufficiently job-related is *Prewitt v. U.S. Postal Service*, 662 F.2d 292 (5th Cir. 1981). In that case the Fifth Circuit held that where a handicapped applicant for a clerk/carrier position with the Postal Service had satisfactorily performed a similar job several years previously despite his handicap, and the applicant had submitted an uncontroverted affidavit that his physical condition was unchanged, a genuine issue of material fact existed. Thus, the Fifth Circuit reversed the district court's grant of summary judgment in favor of the Postal Service.

[44] 29 C.F.R. §1613.706 (1989). For an explanation of the Section 504 regulations dealing with pre-employment inquiries *see* chapter 6 of this text, *supra*.

D. Substantive Issues Under Section 501

For most purposes, the same substantive rules apply with respect to both Sections 501 and 504. Thus, Section 504 case law concerning the issues of who is a handicapped person and what constitutes reasonable accommodations that must be made for otherwise qualified handicapped persons[47] is also applicable to cases arising under Section 501. In a few areas, however, substantive issues under Section 501 may raise specific concerns. These special concerns arise because federal agencies have a duty under Section 501 to engage in affirmative action practices to ensure the employment of handicapped persons[48] (a duty that does *not* exist under Section 504), and because the federal government is supposed to be a model employer of handicapped persons.[49] The question is: to what extent, if any, does the Section 501 affirmative action component require federal agencies to take steps to accommodate disabled persons that are *not* required of recipients of federal financial assistance under Section 504? This chapter will discuss several areas in which employers have—or may have—greater responsibilities under Section 501 than under Section 504.

1. Alcoholics and Drug Abusers

While alcoholism and drug abuse are considered handicaps under both Sections 501 and 504 (as well as under Section 503),[50] only Section 501 prohibits employment discrimination against current alcoholics or drug abusers who have neither been rehabilitated nor are undergoing rehabilitation.[51] An alcoholic or drug abuser who is not undergoing rehabilitation is not protected from employment discrimination under Sections 503 or 504,[52] but *is* protected from employment discrimination under Section 501.[53] As the Eighth Circuit stated in *Crewe v. United States Office of Personnel Management*, this distinction is "logical because of the federal government's greater affirmative action duty in the employment of the handicapped."[54]

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[45] 29 C.F.R. §1613.703 (1989).

[46] 29 C.F.R. §§1613.708-.709 (1989).

[47] *See* chapters 4 and 5 of this text, *supra*.

[48] *See* 29 U.S.C.A. §791(b) (1982 and West Supp. 1990).

[49] *See, e.g.*, 29 C.F.R. §1613.703 (1989) (DOL Section 501 regulations) ("The Federal Government shall become a model employer of handicapped individuals").

[50] *See* section II of this chapter, *infra*.

[51] 29 U.S.C.A. §706(8)(B) (West Supp. 1990).

But what is the extent of a federal agency's duty to accommodate an employee who is a nonrehabilitated alcoholic or drug abuser? In a leading case on this issue, *Whitlock v. Donovan*,[55] an alcoholic employee was terminated by the DOL due to repeated absences from work notwithstanding the employer's efforts to obtain counseling and treatment for the employee. A brief review of the facts is pertinent to an understanding of this case:

In 1977 the employee, Whitlock, had an alcoholic seizure on the job and was taken to a hospital. After a few days he returned to work, but his supervisor referred him for counselling and he participated in an out-patient alcoholic treatment program conducted by the government. Subsequently Whitlock was an excellent employee until 1980. In 1980 Whitlock began being absent from work. DOL arranged for Whitlock to undergo detoxification at a local hospital, but Whitlock refused to participate in the hospital's aftercare treatment program. Between Christmas of 1981 and February 1982 Whitlock missed 152 hours of work, including two consecutive weeks. He was again referred to the DOL counselling service, and was given a firm choice between discipline and treatment. His supervisor accompanied him to the first counselling session. Whitlock was detoxified at a hospital and placed in an intensive out-patient treatment program by the DOL. He also began treatment with a private psychiatrist. Accordingly, the DOL's proposed suspension of Whitlock was reduced to a reprimand, but Whitlock was informed that further incidents might result in dismissal. Whitlock completed the therapy program but again refused to participate in the aftercare program. Subsequently, his excessive absences at work resumed. The DOL placed him on annual leave for two weeks while he was again detoxified. When Whitlock's absences continued and he refused further treatment he was fired by the DOL (after having been absent without leave from work for 320 hours in nine months). He was denied disability retirement because his doctors said that he could work when he was sober.

Whitlock claimed that the DOL discriminated against him in violation of Section 501. Whitlock alleged that: (1) the DOL should have more forcefully informed him at an earlier stage that he had a clear choice between going for treatment or being fired; (2) the DOL failed to follow up on his treatment when he stopped attending treatment sessions; and (3) when he was fired, almost a year after he ceased the recommended treatment, he was not given the option of taking a long leave without pay for intensive inpatient treatment or accepting disability retirement.

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[52] *See* chapter 4 of this text, *supra*.

[53] *See, e.g.*, *Crewe v. U.S. Office of Personnel Management*, 834 F.2d 140, 142 (8th Cir. 1987).

[54] *Id.*

[55] 598 F. Supp. 126 (D.D.C. 1984), *aff'd without opinion*, 790 F.2d 964 (1986).

The court ruled in Whitlock's favor. First, the court held that when Whitlock dropped out of the last treatment program, the DOL should have required him immediately to reenter that or another program or face suspension. Delay and indecision is not permissible under the United States Office of Personnel Management Policy, which sets forth procedures for dealing with alcoholism and drug abuse among employees.[56] Additionally, the court held that the DOL mishandled Whitlock's evaluation. There was evidence that leave without pay to allow Whitlock to enter an intensive alcohol treatment program would have been beneficial, but the DOL failed to consider whether such a leave would have imposed an undue hardship on the agency. The court ordered the DOL to allow Whitlock to reapply for the job in question and undergo a fitness-for-duty examination. If Whitlock was not found fit for duty, the court ruled, he should be allowed to seek disability retirement.

The *Whitlock* court summarized the duties of a federal agency to an alcoholic employee as follows:

> [W]hen an employee's performance deficiencies are suspected to be due to alcohol, the agency is obligated first to offer counselling to the employee. If the employee rebuffs the offer, and if the deficiency in his work is such that discipline would be warranted, the agency should offer a "firm choice" between treatment and discipline. An agency is obligated to follow through with its firm choices. Since it is recognized that relapse is predictable in treatment of alcoholics, an agency is not justified in automatically giving up on an employee who enters treatment but who subsequently relapses. In such a case, the agency may follow through with discipline short of removal. However, the agency is obligated before removing the employee from its work force to evaluate whether keeping the employee presents an undue hardship. . . . If removal seems to be the only feasible option, the agency is obligated to conduct a formal evaluation, including a fitness-for-duty examination if necessary, to confirm whether the employee's alcoholism disease is in fact responsible for the employee's poor performance. If so, the agency must offer leave without pay if the employee will seek more extensive rehabilitative therapy that seems promising, and the agency must also counsel the employee regarding disability retirement.[57]

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[56] The court referred to Federal Personnel Manual System Supplement 792-2, "Alcoholism and Drug Abuse Programs" (1980). 598 F. Supp. at 131.

[57] 598 F. Supp. at 133-34 (interpreting Section 501, the Federal Personnel Manual and the Comprehensive Alcohol Abuse and Alcoholism Prevention Treatment and Rehabilitation Act of 1970, 42 U.S.C.A. §290dd-1(a), c(1), (d) (West Supp. 1990) (Alcohol Abuse Act)).

Other courts have considered the extent of a federal agency's duty to accommodate an alcoholic employee. In *Ferguson v. United States Department of Commerce*[58] the court held that the federal agency *should have known* that an employee suffered from alcoholism based on several factors, including the fact that the employee was absent for 389 days out of a three-year period. Thus, the fact that the employee did not present evidence of his alcoholism until after he was terminated did not relieve the federal agency from the duty to accommodate under Section 501. The court held that the agency must allow the employee to reapply for the job at issue and undergo a fitness-for-duty examination. The employee was entitled to back pay from the date of discharge to the date on which he was either rehired or placed on disability retirement.

In another case, *Burchell v. Department of the Army*,[59] the district court held that the Army violated Section 501 when it dismissed an alcoholic civilian employee after he was terminated from a rehabilitation program as a "rehabilitative failure" without determining whether the employee's alcoholism could reasonably be accommodated or considering the options of allowing the employee to use accumulated sick leave to undergo further treatment or to take disability retirement. The court held that the appropriate remedy was to allow the employee to reapply for reemployment and undergo a fitness-for-duty examination. If the employee was found fit for employment the Army was obligated to rehire him at the appropriate grade; if he was not found fit for duty the Army was required to allow him to seek disability retirement. The court in *Burchell*, however, denied the plaintiff's request for back pay pending rehiring or disability retirement, because the plaintiff would have been required to participate in an intensive rehabilitation treatment program during his period of dismissal, and because the plaintiff had worked profitably and full-time at his own business during that period.[60]

The legislative history of the Alcohol Abuse Act provides that an alcoholic may be removed from federal employment only when he or she cannot properly perform the duties of the job, *and* the employee either: (1) refuses to accept rehabilitative treatment, or (2) has repeatedly failed in such treatment. 598 F. Supp. at 131 n.8; *accord, Fisher v. Walters*, No. 85 C 1201, slip op. (E.D. Ill. January 26, 1988) (available on Lexis genfed library).

[58] 680 F. Supp. 1514 (M.D. Fla.), *opinion withdrawn due to amicable settlement between the parties*, 694 F. Supp. 1541 (M.D. Fla. 1988).

[59] 679 F. Supp. 1393 (D.S.C. 1988), *aff'd in part and rev'd in part on other grounds*, 869 F.2d 253 (4th Cir. 1989).

[60] On appeal, however, both parties agreed that the district court "erred in the factual findings which it made in denying Burchell back pay." 869 F.2d 253, 260 (4th Cir. 1989). Thus, the case was "remanded for additional findings on the back pay issue." *Id.*

In an action consolidated with the appeal of *Burchell, Rodgers v. Lehman*, 869 F.2d 253 (4th Cir. 1989), the plaintiff alleged that the Department of Navy improperly removed him from his civilian job due to alcohol-related absences. The Fourth Circuit held as follows with respect to both Burchell and Rodgers:

A few courts have found that federal employers *did* satisfy their Section 501 obligations to accommodate alcoholic employees. In *Fisher v. Walters*[61] the court held that the guidelines set forth in *Whitlock* had been satisfied by the Veterans Administration prior to firing an alcoholic employee. In *Fong v. United States Department of the Treasury*[62] the court held that the Treasury Department did not violate Section 501 when it fired an employee who neither informed the department of his alcohol problem nor documented other medical conditions causing his excessive absences from work. The court found that there was insufficient evidence of the employee's alcoholism to put the department on notice that the employee abused alcohol. Further, the court held that the evidence showed that the employee's alcoholism was not related to his failure to provide requested medical documentation for his non-alcohol-related absences. And, in *Lemere v. Burnley*[63] the court held that the Federal Aviation Administration properly terminated the employment of an alcoholic employee after the employee engaged in a pattern of unscheduled absences over a two-year period and refused further treatment. In both *Fisher* and *Lemere* the courts held that the federal agencies had given the alcoholic employee "firm choices" between treatment and dismissal.[64]

Interestingly, the court in *Lemere* stated that "an alternative rationale for its decision could be that plaintiff's two-year pattern of unscheduled absences removed her from the protections of the Rehabilitation Act as someone who had lost the status of a 'qualified handicapped employee.' "[65] The court reasoned that the plaintiff's reported absences prevented her from performing the essential functions of the position. In so stating, the court cited two Section 501 cases—not involving alcoholics or drug abusers—in which excessive absenteeism was held to render employees not otherwise qualified under Section 501: *Matzo v. Postmaster*

> there can be no question . . . that the Navy and the Army treated Rodgers and Burchell with extreme tolerance and patience. Indeed, one of the major complaints of a psychiatrist called by Rodgers as an expert witness was that Rodgers was treated so leniently (until the time of his discharge) that he was able to continue to deny his alcoholism. Rodgers and Burchell were both deprived, however, of an opportunity to participate in an inpatient treatment before being discharged. In neither case does the record disclose any sound reason for the denial of this opportunity, and the government has suggested none on appeal.

869 F.2d at 259-60. Thus, the circuit court ordered Rodgers reinstated to his position and awarded appropriate ancillary relief.

[61] No. 85 C 1201, slip op. (E.D. Ill. January 25, 1988) (available on Lexis genfed library).

[62] 705 F. Supp. 41 (D.D.C. 1989).

[63] 683 F. Supp. 275 (D.D.C. 1988).

[64] *See also, Crewe v. U.S. Office of Personnel Management*, 834 F.2d 140 (8th Cir. 1987) (similar).

[65] 683 F. Supp. at 280.

General[66] and *Wimbley v. Bolger.*[67] To the extent that the *Lemere* court implied that reasonable accommodations to assist the federal employee in overcoming the effects of her alcoholism (such as excessive absenteeism) would not be required, however, the court's alternate rationale appears incorrect. The courts have consistently recognized that Section 501's affirmative action requirement imposes a more stringent duty on federal employers.[68]

With respect to drug abusers, one court has held that a federal agency violated Section 501 by discharging an employee who had been treated for cocaine addiction. In *Nisperos v. Buck*[69] an attorney with the Immigration and Naturalization Service (INS) successfully completed an inpatient rehabilitation program after having been arrested on drug charges.[70] The INS argued that the plaintiff's past use of illegal drugs and his arrest disqualified him from being an INS attorney since those factors undermined the integrity of and the public confidence in the INS. The INS relied on *Copeland v. Philadelphia Police Department,*[71] where the Third Circuit held that Section 504 did not require a police department to accommodate a police officer who used illegal drugs since that would constitute a substantial modification of the department's essential functions and undermine the integrity of the police department. The district court held that the situation in *Copeland* was not analogous to the situation in *Nisperos*. The court stated that the position of an INS attorney is not analogous to the position of a police officer, since a "police officer is on the front line of law enforcement," while as an INS attorney the plaintiff "had no responsibilities for the investigation, apprehension, or detention of individuals suspected of criminal offenses."[72]

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[66] 685 F. Supp. 260 (D.D.C. 1987) (manic-depressive employee whose illness caused her to miss excessive work time held not otherwise qualified to work as a postal employee), *aff'd without opinion*, 861 F.2d 1290 (D.C. Cir. 1988).

[67] 642 F. Supp. 481 (W.D. Tenn. 1986) (employee with diabetes and mental illness failed to show that the post office's attendance control program was applied differently to him than to other employees or that the manner in which the program was applied had anything to do with his physical or mental condition), *aff'd without opinion*, 831 F.2d 298 (6th Cir. 1987).

[68] *See* text at notes 55-63, *supra*.

[69] 720 F. Supp. 1424 (N.D. Cal. 1989).

[70] The attorney had attempted to enter a rehabilitation program at least twice prior to his arrest. The first time he did not start treatment because his supervisor did not wish him to miss a training program. The second time he was placed on a waiting list at the rehabilitation center.

[71] 840 F.2d 1139 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1636 (1989). For a discussion of this case *see* chapter 5 of this text, *supra*.

[72] 720 F. Supp. at 1431.

2. Reassignment

An interesting question is whether Section 501 imposes a more stringent duty on federal agencies to reassign disabled employees to other jobs when such employees are unable—due to their disabilities—to perform the duties of their initial positions. As previously noted,[73] the Supreme Court stated in *School Board of Nassau County v. Arline*[74] that Section 504 requires an employer who is a recipient of federal financial assistance to reassign a disabled employee to another position only if the employer has existing policies that allow for such reassignment. A few courts have held that the *Arline* standard also applies to actions under Section 501. In *Davis v. United States Postal Service*[75] a Postal Service employee was unable to perform the duties of his entry-level position due to his physical handicap—hemophilia with arthritis. The court ruled that the Postal Service had no duty under Section 501 to reassign the employee to a new entry-level position to which he would not be entitled under the Postal Service's collective bargaining agreement with its employees. In so ruling, the court relied in large part on the Supreme Court's statement in *Arline*.[76] And, in *Coley v. Secretary of the Army*[77] the court followed the Supreme Court's statement in *Arline* when holding that because the Army normally provided alternative employment options under existing policies, reassignment of a disabled employee was required. Other courts have also referred to the Supreme Court's statement in *Arline* when discussing reassignment under Section 501 (rather than under Section 504).[78]

Some courts have relied in part on the Section 501 regulations when holding that reassignment is not required. In *Alderson v. Postmaster General of the United States*,[79] for example, the court held that although the Section 501 regulations define the term "reasonable accommodations" as including "job restructuring,"[80] that regulatory term does not require assignment to a *different* job. The court stated that the Section 501 regulation:

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[73] *See* chapter 6 of this text, *supra*.

[74] 480 U.S. 273, 289 n.19, 107 S. Ct. 1123, 1132 n.19 (1987), 1986-87 EHLR 558:228, 235 n.19.

[75] 675 F. Supp. 225 (M.D. Pa. 1987).

[76] 675 F. Supp. at 233. The court also relied on earlier district court cases in which reassignment was held not required under Section 501.

[77] 689 F. Supp. 519 (D. Md. 1987).

[78] *See, e.g., Hoffman v. U.S. Department of the Army*, No. 85 C 6045, slip op. (N.D. Ill. March 24, 1987) (available on Lexis genfed library), *vacated and remanded without opinion*, 869 F.2d 1495 (7th Cir. 1989).

In *AFGE, Local 51 v. Baker*, 677 F. Supp. 636, 638 (N.D. Cal. 1987), the court followed the same reasoning applied by the Supreme Court in *Arline* without citing *Arline*. The court stated that although Section 501 does not require employers "to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies."

[79] 598 F. Supp. 49 (W.D. Okla. 1984).

[80] 29 C.F.R. §1613.704(b) (1989).

> clearly refers to making the particular job, not another job for which the handicapped person was not hired, accessible to handicapped persons. In fact, the primary relief which the plaintiff desires to obtain by way of this lawsuit appears to be getting another job within the Postal Service, not reinstatement to the physically demanding job of letter carrier.[81]

Similarly, in *Jasany v. United States Postal Service*[82] the court held that while Section 501 requires an employer to make adjustments in the position for which the handicapped individual was hired, it does not require the employer to create a new position for the handicapped employee. And, while the court in *Carty v. Carlin*[83] recognized that the regulatory examples of reasonable accommodations are *not* all-inclusive, the court held that reassignment is not required. The court stated:

> Examination of the [Section 501] regulation leads to the ultimate conclusion that the duty to reasonably accommodate only contemplates accommodation of a qualified handicapped employee's present position. It does not include a requirement to reassign or transfer an employee to another position. Preferential reassignment for handicapped employees was not intended by the Rehabilitation Act. The Rehabilitation Act and its accompanying regulations indicate that the law requires reasonable workplace modification or accommodation in order to allow the handicapped person to remain in that position. There is nothing in the law or accompanying regulations to suggest that reasonable accommodation requires an agency to reassign an employee to another position.[84]

Still other courts have agreed with the position taken by federal agencies that the Section 501 regulatory requirement that handicapped individuals be otherwise qualified to perform the essential functions of the "position in question"[85] refers *only* to the plaintiff's *current* position within the federal agency, and not to other possible positions within the agency.[86] Federal agencies generally take the position that since the need for reassignment admits that the disabled employee cannot perform the essential functions of his or her original job, reassignment cannot be an accommodation of that job. The EEOC, however, disagrees with the position taken by the federal agencies (and with the courts that have agreed with that position). The EEOC interprets the "position in question" language as including *any* position the employee could have held as a reasonable accommodation.[87] Thus, a handicapped federal employee who seeks reassignment as a reasonable accommodation will generally fare better at the administrative level than in the courts.

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[81] 598 F. Supp. at 55.

[82] 33 Fair Empl. Prac. Cas. (BNA) 1115 (N.D. Ohio 1983), *aff'd on other grounds*, 755 F.2d 1244 (6th Cir. 1985).

[83] 623 F. Supp. 1181 (D. Md. 1985).

[84] 623 F. Supp. 1188-89. Similarly, in *Carter v. Tisch*, 822 F.2d 465, 467 (4th Cir. 1987), the court stated: "[t]he case law is clear that, if a handicapped employee cannot do his job, he can be fired, and the employer is not required to assign him to alternative employment." *See also*, *Wimbley v. Bolger*, 642 F. Supp. 481, 486 (W.D. Tenn. 1986) ("a federal agency is under no obligation to transfer a handicapped employee from the job for which he is employed to some other position in order to provide him with work which he can perform"), *aff'd without opinion*, 831 F.2d 298 (6th Cir. 1987).

[85] 29 C.F.R. §1613.702(f) (1989).

One court has indicated a somewhat greater willingness to look at the reassignment issue. In *Rhone v. United States Department of the Army*[88] the court noted that the United States Office of Personnel Management's *Handbook on Reasonable Accommodations* (Handbook) provides as follows when discussing the reassignment of handicapped employees:

> The employee's work experience and education may indicate that he or she can perform satisfactorily in *another position. Under certain circumstances, an exception may be made to normal qualification standards to facilitate reassignment.* Reassignment need not necessarily be limited to positions of the same grade or series. The possibility that the employee would be willing to accept reassignment to a lower grade position with less strenuous physical or mental demands is not to be overlooked.[89]

The court further noted that the Federal Personnel Manual provides that agencies " '*must* exhaust all reasonable efforts to alleviate any service deficiencies through accommodation and/or *reassignment*' " before counselling employees to seek disability retirement, and that the agency " '*must* review all vacant positions under its jurisdiction, at the same grade or pay level and tenure in the commuting area . . .' " prior to considering an employee's request for disability retirement.[90] Thus the court in *Rhone* held that the Army violated Section 501 when it failed to make a substantial effort to find a career civilian employee with sarcoidosis a position in which the employee could satisfactorily perform. The court stated that "[t]he bottom line as to plaintiff's [Section] 501 claim is that there were mandatory avenues of accommodation open to the defendants, such as reassignment, and available positions for which the plaintiff was likely qualified and entitled to occupy."[91]

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[86] *See, e.g., Hoffman v. U.S. Army*, No. 85 C 6045, slip op. (N.D. Ill. March 24, 1987) (available on Lexis genfed library), *vacated and remanded without opinion*, 869 F.2d 1495 (7th Cir. 1989); *Dancy v. Kline*, 639 F. Supp. 1076 (N.D. Ill. 1986).

[87] *See, e.g., Ignacio v. U.S. Postal Service*, Petition No. 03840005 (EEOC Decision, September 4, 1984); *Orias v. Department of Navy*, Petition No. 03820090 (EEOC Decision, November 8, 1983); *Ignacio v. U.S. Postal Service*, 30 M.S.P.R. 471 (Spec. Panel No. 1, February 27, 1986); *Lynch v. Department of Education*, 31 M.S.P.R. 519 (Spec. Panel No. 2, August 20, 1986). Some courts have expressly disagreed with the EEOC's position. *See, e.g., Davis v. U.S. Postal Service*, 675 F. Supp. 225, 232 (M.D. Pa. 1987); *Dancy v. Kline*, 639 F. Supp. 1076, 1079 (N.D. Ill. 1986).

[88] 665 F. Supp. 734 (E.D. Mo. 1987).

[89] 665 F. Supp. at 744 (citing Handbook at 10) (emphasis added in *Rhone*).

[90] 665 F. Supp. at 744 (citing Federal Personnel Manual (FPM) at chapter 831 and FPM Letter 831-78, attachment 1; S10-4a) (emphasis added in *Rhone*).

3. Consideration of Applicants for Other Positions

A related question to the issue of whether Section 501 requires reassignment of disabled employees is whether the affirmative action requirements of Section 501 obligate a federal agency, after having determined that a handicapped applicant is not otherwise qualified for the job for which he or she has applied, to consider the applicant for *other* positions within the agency (for which he or she has not applied). In *Dexter v. Carlin*[92] the court stated:

> In this case, there is no contention that the plaintiff's handicap made him less able to apply for a variety of jobs than any other applicant would be. Therefore, requiring the defendant to consider the plaintiff for positions for which he did not apply would not represent an accommodation to his handicap. Such a requirement would extend the federal employer's obligation to a duty to make accommodations for applicants simply because they are handicapped without regard to the specific handicap at issue.[93]

In the opinion of the authors, the reasoning of *Dexter v. Carlin* disregards the affirmative action component of Section 501. Federal agencies are charged with responsibility for *aggressively* seeking to hire disabled persons. If a disabled employee applies for a job with a federal agency, and the federal agency determines that the applicant is unqualified for the particular job for which he or she applied, one means of complying with the agency's affirmative action responsibility is for the agency to consider that applicant for other available positions within its organization.

4. Section 501 and Collective Bargaining Agreements

Courts have consistently held that Section 501 does not require federal employers to make accommodations for disabled employees that would contravene the provisions of an otherwise applicable collective bargaining agreement. In *Hurst v. United States Postal Service*[94] the court considered the question of what effect a

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[91] 665 F. Supp. at 747.

[92] 40 Fair Empl. Prac. Cas. (BNA) 633 (D. Conn. 1986).

[93] 40 Fair Empl. Prac. Cas. (BNA) at 637 (footnote omitted).

[94] 653 F. Supp. 259 (N.D. Ga. 1986).

bona fide seniority system has on the rights of handicapped individuals under Section 501. The court noted that the Civil Rights Act provides that:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .[95]

The court ruled that because Section 505 of the Rehabilitation Act incorporates the remedies, procedures and rights set forth in the Civil Rights Act, the limitations on actions brought under the Civil Rights Act should also apply to actions brought under the Rehabilitation Act. Thus, the court held that the Civil Rights Act's express exemption for *bona fide* seniority systems should apply to the plaintiff's Section 501 action. Accordingly, the court found that the Postal Service did not violate Section 501 when it refused to consider a handicapped employee's application for a job for which he was not eligible under the Postal Service's collective bargaining agreement.

Courts that have considered whether federal agencies have a duty to reassign disabled employees have also discussed whether reassignment would conflict with collective bargaining agreements. In *Carty v. Carlin*,[96] for example, the court noted that

> [t]he Supreme Court has cautioned against infringing the rights of innocent employees when fashioning Title VII remedies (citations omitted). If the plaintiff were automatically reassigned to another department, this could eliminate his need to compete with other qualified employees. Such a reassignment might also violate other employees' rights secured by the collective bargaining agreement between the Postal Service and the unions.[97]

Similarly, in *Carter v. Tisch*,[98] the court stated:

> In this case the postal service's justification for refusing reassignment is even stronger: it was bound by a collective bargaining agreement. Reassigning Carter to permanent light duty, when he was not entitled to one of a limited number of light duty positions, might have interfered with the rights of other employees under the collective bargaining agreement.[99]

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[95] 653 F. Supp. at 261-62 (quoting 42 U.S.C. §2000e-2(h) (1982)).

[96] 623 F. Supp. 1181 (D. Md. 1985).

[97] 623 F. Supp. at 1189.

[98] 822 F.2d 465 (4th Cir. 1987).

[99] 822 F.2d at 467.

And, in *Jasany v. United States Postal Service*[100] the court held that "[a]n employer cannot be required to accommodate a handicapped employee by restructuring a job in a manner which would usurp the legitimate rights of other employees in a collective bargaining agreement."[101]

5. Section 501 and Non-Competitive Service Positions

Another interesting question is whether handicapped employees hired outside the normal competitive service process are entitled to the full protection of Section 501. At least two courts have answered that question affirmatively. In *Shirey v. Devine*[102] a deaf man applied for a job as a computer systems analyst with the National Aeronautics and Space Administration (NASA). He was hired as an "excepted service" employee in a position exempted from the competitive service under an experimental exception created for positions filled by handicapped persons prior to the enactment of Sections 501, 503 and 504 of the Rehabilitation Act. For over four years Shirey was a successful employee. Subsequently, NASA announced a reduction in force that would abolish 83 positions, including Shirey's. Competitive service employees had certain job protections: they could bump employees with less seniority from a job that had not been abolished and they received reemployment priority rights. Excepted status employees like Shirey, however, did not receive those benefits. Shirey claimed that NASA's policy, which denied him the same benefits given to competitive service employees, violated Section 501. The majority of the District of Columbia Circuit agreed.

Shirey was followed in *Allen v. Heckler.*[103] In the latter case former mental patients were hired by the federal mental institution at which they were previously patients under an excepted service program. That program provided that patients who were discharged from federal mental hospitals could be given special hiring consideration by the institutions in which they received treatment. Although such excepted service workers performed the same work as their competitive service counterparts, and their work was judged by the same standards, they were given fewer job benefits than competitive status employees. The court agreed that the excepted status employees were discriminated against within the meaning of Section 501. The *Allen* court explained that the ruling in *Shirey* means, at least, that workers cannot be given fewer benefits solely because of their handicaps. Because Section 501 is more than a command to preserve the status quo, it is not enough under that Section to treat excepted workers differently and to attempt to justify that different treatment by claiming that equal treatment would be available if the disabled workers chose to apply for employment via the competitive process rather than via the excepted service process.[104]

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[100] 755 F.2d 1244 (6th Cir. 1985).

[101] 755 F.2d at 1251-52. *See also, Bey v. Bolger,* 540 F. Supp. 910 (E.D. Pa. 1982) (handicapped employee not entitled to light duty status where such an accommodation would conflict with the seniority provisions of a collective bargaining agreement); *Daubert v. U.S. Postal Service,* 733 F.2d 1367 (10th Cir. 1984) (same).

It should be noted that in *Rhone v. U.S. Department of the Army,* 665 F. Supp. 734 (E.D. Mo. 1987) (discussed in the previous section of this chapter), where the court held that reassignment was a viable means of accommodating a disabled employee, the Army's collective bargaining agreement did *not* preclude such reassignment.

[102] 670 F.2d 1188 (D.C. Cir. 1982).

[103] 780 F.2d 64 (D.D.C. 1985).

6. Safety

Section 501, like Section 504, contains a safety defense pursuant to which a disabled employee or applicant will not be held otherwise qualified for a position with a federal agency if he or she cannot perform the essential functions of the job "without endangering the health or safety of the individual or others. . . ."[105] A leading case discussing the safety defense in the context of Section 501 is *Mantolete v. Bolger.*[106] Bonnie Mantolete suffered from epilepsy. She applied for a job as a machine distribution clerk at the Post Office. The Postal Service refused to hire Mantolete due to fear that she would have a seizure and be injured while operating a letter sorting machine. The district court found that the Postal Service had not violated Section 501. That court held that a federal employer is justified in not employing a handicapped person if she presents "an elevated risk of injury." The Ninth Circuit disagreed. The Ninth Circuit rejected the elevated risk of injury standard, and held that in order to exclude a handicapped person from employment due to a fear of injury "there must be a showing of reasonable probability of substantial harm" that cannot be based on an employer's subjective evaluation or merely on medical reports. Rather, the individual's work history and medical history must both be evaluated to determine whether employment of the individual would pose a reasonable probability of substantial harm. The employer is therefore compelled to gather substantial factual information to ensure that its decision is not based on misinformed stereotypes.

Another illustrative case discussing the safety issue in the context of Section 501 is *Dexler v. Tisch.*[107] In that case the court held that the Postal Service did not violate Section 501 when it refused to hire an applicant who suffered from achondroplastic dwarfism (which caused him to be short in stature and also to have short arms and legs). Although evidence showed that use of a step stool would enable the applicant to "extend his reach to the height necessary to safely perform about 90 percent of the duties of a distribution clerk,"[108] the court found that the stool would pose a safety risk in two ways: Mr. Dexler would be somewhat unstable atop the stool due to his weight and height, and there was "a risk that Mr. Dexler or his stool could be bumped, causing him to fall."[109] Second, before and after the stool was used "it might be an obstacle to others and might be difficult to see because of its height and because other workers [were] likely to be pushing large conveyances. . . ."[110] In addition, the court found that "[t]he use of a step stool would impair productivity because time would be required to move the stool into position."[111] Similar problems were found to exist with the use of a platform. The court ruled, therefore, that "the use of a stool or a platform is not a reasonable accommodation because of the safety problems and the loss of efficiency."[112] In that case, unlike in *Mantolete*, the court did not address the question of the sufficiency of the evidence necessary to establish a safety defense.

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[104] The Section 501 regulations attempt to address this subject by providing that a "qualified handicapped person" is, *inter alia*, one who meets the experience and/or education requirements for the job or "meets the criteria for appointment under one of the special appointing authorities for handicapped persons." 29 C.F.R. §1613.702(f) (1989).

[105] 29 C.F.R. §1613.702(f) (1989).

[106] 767 F.2d 1416 (9th Cir. 1985), *mot. for reconsid. denied*, 791 F.2d 784 (9th Cir. 1986).

[107] 660 F. Supp. 1418 (D. Conn. 1987).

7. Qualified Handicapped Person

When attempting to define the term "qualified handicapped person" under Section 501, the Ninth Circuit held in *Mantolete v. Bolger*[113] that "there is no reason that the [Section] 501 definition should differ from that of [Section] 504, except that [Section] 501 and its regulations impose an explicit requirement that accommodation of the handicap be considered in determining a handicapped person's qualification for federal employment."[114] This statement is in accord with the reasoning followed by most courts, which appear to apply the same tests and standards when determining whether a handicapped employee or applicant is otherwise qualified for a job under either Section 501 or Section 504 (or Section 503).[115]

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[108] 660 F. Supp. at 1423.

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] 660 F. Supp. at 1428.

[113] 767 F.2d 1416 (9th Cir. 1985).

[114] 767 F.2d at 1421.

[115] Illustrative cases deciding the "otherwise qualified' issue in the context of Section 501 include *Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983) (where the federal agency would have had to require other personnel to perform many of the plaintiff's duties and only two to four other workers were available at any time, in light of the agency's limited resources such "doubling up" would impose an undue hardship on the agency); *Gardner v. Morris*, 752 F.2d 1271, 1280-81 (8th Cir. 1985) (stating

E. Damages Under Section 501

Section 505a of the Rehabilitation Act[116] provides that the remedies available to a handicapped person who suffers employment discrimination by a federal employer are the same remedies available to an individual who suffers employment discrimination under Title VII.[117] Title VII provides that an employee or job applicant who has been unlawfully discriminated against is entitled to injunctive or equitable relief, and to reinstatement and back pay if the individual was wrongfully denied employment or terminated from employment.[118] In appropriate circumstances a court may also order an employer to promote an individual who was

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that although Section 501 expressly requires federal agencies to develop affirmative action programs for handicapped employees, the Act "does not contemplate . . . that a federal employer will launch major restructuring of projects and facilities, disregarding the expense of this accommodation"; and holding that the Army Corps of Engineers could not reasonably accommodate a civil engineering technician who was a manic depressive at its Saudi Arabia facilities since the Army would have to hire a full-time doctor and provide on-site blood testing facilities, which would unduly burden the agency); *Wimbley v. Bolger*, 642 F. Supp. 481 (W.D. Tenn. 1986) (handicapped Postal Service employee did not show that his supervisors failed to make an effort to accommodate his disability; the record showed that the employee was not terminated due to the failure to perform assigned tasks, but was terminated due to the failure to report to work or to notify his supervisor that he would be absent to receive medical treatment for his disability), *aff'd without opinion*, 831 F.2d 298 (6th Cir. 1987); *Fields v. Lyng*, 705 F. Supp. 1134 (D. Md 1988) (individual with personality disorder was not otherwise qualified for a position as a labor relations specialist with the U.S. Department of Agriculture; the job required extensive travel and the employee's illness caused him to suffer anxiety about traveling and to shoplift and engage in related dishonesty; the court held that the employee was not otherwise qualified to perform the job since he could not safely travel or be trusted as a negotiator), *aff'd without opinion*, 888 F.2d 1385 (4th Cir. [illegible]); *Adams v. Alderson*, 723 F. Supp. 1531, 1532 (D.D.C. 1989) (holding that an individual unable to refrain from violence against his supervisor was not otherwise qualified for employment, and stating that "[a]n agency is entitled to assign its personnel as the needs of its mission dictate. It is not obligated to indulge a propensity for violence . . . to the point of transferring potential assailants . . . solely to keep peace in the workplace"); *Matzo v. Postmaster General*, 685 F. Supp. 260 (D.D.C. 1987) (Postal Service fulfilled its obligation to reasonably accommodate a handicapped employee by having other workers do her work and by offering her a settlement converting her dismissal to a resignation and rendering her eligible to be rehired at a lower rate if found fit for duty after an examination), *aff'd without opinion*, 861 F.2d 1290 (D.C. Cir. 1988); *Arneson v. Heckler*, 879 F.2d 393 (8th Cir. 1989) (remanding the case to the district court to determine whether a claims representative for the Social Security Administration—who developed a neurological disorder that limited his ability to perform paperwork—would be otherwise qualified to perform the job with the accommodation of a proofreader to check his work). *See also*, *Guinn v. Bolger*, 598 F. Supp. 196 (D.D.C. 1984) (where the Postal Service failed to honor its own job description, its proffered justification for dismissing the plaintiff due to "business necessity" was insufficient to rebut the plaintiff's claim of discrimination under Section 501).

[116] 29 U.S.C.A. §794a (1985 and West Supp. 1990).

[117] 42 U.S.C.A. §2000e-17 (1981).

[118] 42 U.S.C.A. §2000e-5(g) (1981).

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wrongfully denied promotion.[119] In addition, courts may award attorneys' fees to the prevailing party.[120]

Courts have fairly wide latitude in fashioning equitable relief for violations of Section 501. For example, in *Harrison v. Marsh*[121] the court ordered the Department of the Army (1) to accommodate the handicaps of the plaintiff, a civilian employee, (2) to transfer the plaintiff to another office at her place of work, (3) to place the plaintiff in a position that would allow for future advancement, and (4) to begin immediately to compensate the plaintiff at a higher level of pay to reflect a salary she would have achieved if she had been properly accommodated originally. A court may order reinstatement with competitive seniority when fashioning relief to eradicate the effects of prior discrimination, under appropriate circumstances.[122] Because Congress intended that Title VII remedies, (and thus Section 501 remedies) be "make-whole" remedies, an order of reinstatement with seniority should be in addition to any monetary relief (such as back pay) awarded.[123] Title VII does not on its face, however, provide for the recovery of legal damages, and courts have uniformly held that plaintiffs may not recover consequential or punitive damages resulting from employment discrimination in violation of Title VII.[124] The same rule apparently applies to Section 501.

F. Attorneys' Fees Under Section 501

Section 505(b) of the Rehabilitation Act provides that the court "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs" of litigating an action under Section 504.[125] Because this section applies in equal fashion to Sections 501, 503, and 504 of the Rehabilitation Act, case law discussing an award of attorneys' fees under Section

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[119] *Id.*

[120] 42 U.S.C.A. §2000e-5(k) (1981). *See also, Christiansburg Garment Co., v. EEOC*, 434 U.S. 412, 98 S. Ct. 695 (1978) (awarding attorneys' fees in a Title VII action).

[121] 691 F. Supp. 1223 (W.D. Mo. 1988).

[122] *See, e.g., Shirey v. Devine*, 670 F.2d 1188, 1205 (D.C. Cir. 1982) (awarding reinstatement with competitive seniority in a Section 501 action). *See also, Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764-66, 96 S. Ct. 1251, 1264-65 (1976) (retroactive seniority may be appropriate under Title VII).

[123] *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 419, 95 S. Ct. 2362, 2372 (1975) (discussing Title VII remedies). "Make-whole" remedies are those that put the plaintiff in the position in which he or she would have been absent the discriminatory conduct.

[124] The following cases are illustrative of those in which the courts have held that legal damages, damages for mental distress, and punitive damages are not available under Title VII, since that Title provides only for equitable relief: *Bennett v. Corroon and Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 1140 (1989); *Shah v. Mt. Zion Hospital and Medical Center*, 642 F.2d 268, 272 (9th Cir. 1981).

[125] 29 U.S.C.A. §794a(b) (1985).

504 is applicable to actions arising under Section 501.[126] An interesting case dealing with the issue of whether the plaintiff was a prevailing party in a Section 501 action, however, is *Mantolete v. Bolger.*[127]

In *Mantolete v. Bolger*[128] Bonnie Mantolete claimed that the Postal Service violated Section 501 when it refused to hire her because of her epileptic condition. The district court held that the Postal Service had not violated Section 501. Subsequently, the Ninth Circuit held that the district court should have applied more stringent standards when determining: (1) whether Ms. Mantolete was an otherwise qualified handicapped individual, and (2) whether the Postal Service reasonably accommodated Ms. Mantolete's handicap. In affirming the district court's decision in part and reversing it in part and remanding the case for further consideration, the Ninth Circuit granted Ms. Mantolete an interim award of attorneys' fees in an amount to be determined by the district court. The Postal Service appealed the award of attorneys' fees. Basically, the Postal Service argued that since the Ninth Circuit did not rule on the merits of Ms. Mantolete's appeal (that the Postal Service had discriminated against her on the basis of her handicap), Ms. Mantolete was not the prevailing party in the action. The Postal Service relied on the fact that the question of whether Ms. Mantolete was improperly denied a job remained to be decided by the district court under the higher standard imposed by the Ninth Circuit. The Ninth Circuit disagreed with the Postal Service's contentions.

The Ninth Circuit recognized that a plaintiff "need not succeed on every claim to be entitled to [attorneys'] fees," but that "[a] plaintiff may be considered a prevailing party if he or she 'succeed[s] on any significant issue in litigation which achieves some of the benefit [she] sought in bringing the suit.' "[129] The Ninth Circuit held that Ms. Mantolete had succeeded in obtaining three significant objectives of her lawsuit.

First, the court noted that its decision established a stringent standard for determining whether a disabled person would pose a safety risk in the workplace. While the district court had held that an employer could refuse to hire a disabled person based on an "elevated risk of injury," the Ninth Circuit held that to reject a disabled applicant on safety grounds the employer must show a " 'reasonable probability of substantial harm.' "[130]

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[126] For a discussion of the attorneys' fee issue with respect to cases under Section 504, *see* chapter 8 of this text, *supra*.

[127] 791 F.2d 784 (9th Cir. 1986).

[128] *See* 767 F.2d 1416 (9th Cir. 1985) (initial 9th Cir. opinion).

[129] 791 F.2d at 786 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (discussing the meaning of the term "prevailing party" in the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. §1988)).

[130] 791 F.2d at 786 (referring to 767 F.2d at 1422).

Second, the Ninth Circuit's decision established that the district court "failed to apply a meaningful standard for determining whether the Postal Service could reasonably accommodate Ms. Mantolete's handicap without undue hardship."[131] More specifically, the Ninth Circuit held that the employer has the burden of proof with respect to the reasonable accommodation issue, and that a strong factual showing is required to satisfy that burden.[132]

Finally, the Ninth Circuit noted that "our decision imposes specific, affirmative obligations on federal employers to gather information from the applicant and qualified experts so that they can properly evaluate whether there is reasonable probability of substantial harm, and whether a reasonable accommodation of the applicant's handicap is possible."[133]

In concluding that Ms. Mantolete was the prevailing party in this action, the Ninth Circuit stated:

> All of the issues on which Ms. Mantolete has prevailed involve significant legal principles affecting the substantive rights of the parties. Our decision clarifies and strengthens the right of Ms. Mantolete to be free from the kind of discrimination that the Rehabilitation Act is intended to eradicate. Our decision also imposes specific duties on federal employers to eliminate employment discrimination against handicapped individuals. The significance of this decision goes well beyond the particular facts of this case. Thus, even if Ms. Mantolete does not prevail on her claim that the Postal Service discriminated against her in this specific instance, the standards established by our opinion will aid her in any future application for employment. Moreover, even though this case was not certified as a class action, we consider it important that Ms. Mantolete's success on appeal generally benefits all handicapped persons seeking employment.[134]

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[131] *Id.* (referring to 767 F.2d at 1417-18).

[132] *Id.* (referring to 767 F.2d at 1423-24).

[133] *Id.* (referring to 767 F.2d at 1422-23).

[134] 791 F.2d at 787.

For other cases involving attorneys' fees in the context of Section 501, ***see, e.g.***, *LaFaut v. Smith*, 834 F.2d 389, 395 (4th Cir. 1987) (because the plaintiff's claim under Section 501 was moot when the court entered its declaratory judgment the plaintiff was not a prevailing party and could not recover attorneys' fees); *Hall v. Bolger*, 768 F.2d 1148, 1151 (9th Cir. 1985) (vacating the district court's award of attorneys' fees in a Section 501 action and ordering the court to "recompute the lodestar portion of the award and provide a more detailed account of how it arrives at appropriate figures for 'the number of hours reasonably expended' and 'a reasonable hourly rate' "); *Gardner v. Department of the Army*, No. 80-525 C(3), slip op. (E.D. Mo. June 30, 1983) (available on Lexis genfed library) (discussing the measure of attorneys' fees to be awarded in a Section 501 action and awarding a 20 percent enhancement of the lodestar amount due to the "novelty and difficulty of the factual and legal issues, and the legal skill required"); *Davis v. Frank*, 711 F. Supp. 447, 455 (N.D. Ill. 1989) (ordering the defendant to reimburse the plaintiff for "reasonable attorneys' fees and costs incurred" in a Section 501 action); *Harrison v. Marsh*, 691 F. Supp. 1223, 1232 (W.D. Mo. 1988) (stating the court's intent to award attorneys' fees in a Section 501 action); *Coley v. Secretary of the Army*, 689 F. Supp. 519, 526 (D. Md.

II. Section 503 of the Rehabilitation Act

Section 503 of the Rehabilitation Act[135] requires every contract in excess of $2,500 with any federal department or agency to "contain a provision requiring that, in employing persons to carry out" the contract, the contracting parties "shall take affirmative action to employ and advance in employment qualified individuals with handicaps."[136] Basically, this Section extends the non-discrimination mandates of Section 504 (as applied to recipients of federal financial assistance) and Section 501 (as applied to federal agencies) to persons or companies having contracts (or subcontracts) in excess of $2,500 with the federal government.[137]

For the most part, Section 504 case law dealing with substantive issues is relevant to Section 503, since the definition of a handicapped person is the same under Sections 503 and 504 (including with respect to alcoholics and drug abusers),[138] and since the same duty to make reasonable accommodations for otherwise qualified handicapped persons applies under both Sections 503 and 504.[139] In one regard—the obligation to engage in *affirmative action* to employ

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1987) (stating that the plaintiff "shall be awarded his attorneys' fees and costs" in a Section 501 action); *Wallace v. Veterans Administration*, 683 F. Supp. 758, 767 (D. Kan. 1988) (noting that attorneys' fees would be awarded in a Section 501 action); *Crane v. Dole*, 617 F. Supp. 156, 162 (D.D.C. 1985) (noting in an action under Section 501 that "plaintiff is entitled to reasonable attorney's fees and costs"); *Watson v. Veterans Administration*, 88 F.R.D. 267, 269 (C.D. Cal. 1980) (holding that an administrative agency is authorized to award attorneys' fees in a Section 501 action).

[135] 29 U.S.C.A. §793 (1985 and West Supp. 1990).

[136] *Id.* The full text of Section 503 is set forth in appendix E of this text, *infra*.

[137] To be covered by Section 503, however, an entity must have an *existing* contract or subcontract with the federal government. Thus, in *Burnett v. Brock*, 806 F.2d 265 (11th Cir. 1986), the court held that when the United States Air Force Reserve contacted a newspaper to place ads in the paper, the newspaper did not have a contract with the federal agency until it *published* the advertisements. The agency's order to insert the ads was merely an "offer" for a contract that was not accepted until the newspaper actually published the ads. Thus, an employee of the newspaper who claimed to have been fired in violation of Section 503 after the ads were ordered but before the ads were published did not have a Section 503 claim against the newspaper. Accordingly, the Office of Federal Contract Compliance Programs lacked jurisdiction to file a complaint under Section 503 on the employee's behalf.

[138] *See* 29 U.S.C.A. §706(8)(B) (West Supp. 1990).

[139] *See, e.g.*, 41 C.F.R. §60-741.6(d) (1989) (regulations promulgated by the U.S. Department of Labor's Office of Federal Compliance Programs (OFCCP) pursuant to Section 503). That regulation provides:

> A contractor must make a reasonable accommodation to the physical and mental limitations of an employee or applicant unless the contractor can demonstrate that such an accommodation would impose an undue hardship on the conduct of the contractor's business. In determining the extent of a contractor's accommodation obligations, the

handicapped persons—Section 503 is similar to Section 501.[140] The major issues unique to Section 503, therefore, are procedural issues.

A. Procedural Issues

1. Private Right of Action

The courts are virtually unanimous in their conclusion that no private right of action exists under Section 503.[141] As the Fifth Circuit held in *Rogers v. Frito-Lay,*

> following factors among others may be considered: (1) Business necessity and (2) financial cost and expenses.

[140] In addition to 29 U.S.C. §793, *see, e.g.*, 41 C.F.R. §60-741.4 (1989) (OFCCP regulation). That regulation provides that "[e]ach agency and each contractor and subcontractor shall include the following affirmative action clause in each of its covered government contracts or subcontracts (and modifications, renewals, or extensions thereof if not included in the original contract)." The affirmative action clause to be inserted is quite lengthy. The most significant section of that clause is section (a), which provides that:

> (a) The contractor will not discriminate against any employee or applicant for employment because of physical or mental handicap in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified handicapped individuals without discrimination based upon their physical or mental handicap in all employment practices such as the following: Employment, upgrading, demotion or transfer, recruitment, advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

[141] *See, e.g., Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980); *Davis v. United Airlines, Inc.*, 662 F.2d 120 (2d Cir. 1981), *cert. denied*, 456 U.S. 965 (1982); *Davis v. Ohio Barge Line, Inc.*, 697 F.2d 549 (3d Cir. 1983); *Painter v. Horne Bros., Inc.*, 710 F.2d 143 (4th Cir. 1983); *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981); *Hoopes v. Equifax, Inc.*, 611 F.2d 134 (6th Cir. 1979); *D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1474 (7th Cir. 1985); *Simon v. St. Louis County*, 656 F.2d 316 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982); *Fisher v. Tucson*, 663 F.2d 861 (9th Cir. 1981), *cert. denied*, 459 U.S. 881 (1982); *Hodges v. Atchison, Topeka and Santa Fe Ry. Co.*, 728 F.2d 414 (10th Cir.), *cert. denied*, 469 U.S. 822 (1984); *Beam v. Sun Shipbuilding and Dry Dock Co.*, 679 F.2d 1077 (3d Cir. 1982); *Sanders v. Washington Metropolitan Area Transit Authority*, 652 F. Supp. 765 (D.D.C. 1986), *aff'd*, 819 F.2d 1151 (D.C. Cir. 1987); *Posso v. Pan American World Airways, Inc.*, No. 84 Civ. 8092, slip op. (S.D.N.Y. June 18, 1986) (available on Lexis genfed library); *Patton v. Thompson*, 37 Fair Empl. Prac. Cas. (BNA) 1024 (M.D. Ala. 1983), *aff'd*, 742 F.2d 1465 (11th Cir. 1984), *cert. denied*, 471 U.S. 1005 (1985); *Taylor v. Office of Federal Contract Compliance Programs*, No. 83 C 4940, slip op. (N.D. Ill. August 8, 1985) (available on Lexis genfed library); *Bento v. I.T.O. Corp. of Rhode Island*, 599 F. Supp. 731 (D.R.I. 1984); *Myers v. New England T. and T.*, 33 Empl. Prac. Dec. (CCH) ¶34, 040 (D. Mass. 1983); *Thompson v. Springs Mills, Inc.*, 576 F. Supp. 651 (D.S.C. 1982); *Ernst v. Indiana Bell Telephone Co.*, 30 Fair Empl. Prac. Cas. (BNA) 1248 (S.D. Ind. 1982), *aff'd*, 717 F.2d 1036 (7th Cir. 1983), *cert. denied*, 464 U.S. 1041 (1984); *Moxley v. Vernot*, 555 F. Supp. 554 (S.D. Ohio 1982); *Miller v. Union Pacific Ry. Co.*, 539 F. Supp. 134 (D. Neb. 1982); *Blitz v. Northwest Orient Airlines*, 28 Fair Empl. Prac. Cas. (BNA) 275 (D. Minn. 1981); *Brown v. American Home Products Corp.*, 520 F. Supp. 1120 (D. Kan. 1981); *Auffant v. Searle and Co.*, 25 Fair Empl. Prac. Cas. (BNA) 1254 (D.P.R. 1981); *Healy v. Bergman*, 609 F. Supp. 1448 (D. Mass. 1985); *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226 (7th Cir. 1980); *Jessup v. Chicago and Eastern Illinois RR*, 22 Fair Empl. Prac. Cas. (BNA) 1376 (N.D. Ill. 1978); *Langman v. Western Electric Co.*, 488 F. Supp. 680 (S.D.N.Y. 1980); *Chaplin v. Consolidated Edison Co.*, 579 F. Supp. 1470 (S.D.N.Y. 1984).

Inc.,[142] Section 503 does not confer a right on the benefitted class of handicapped persons, nor does it create a duty upon contractors. Rather, Section 503 simply creates a duty upon federal agencies to make and enforce contracts containing the required affirmative action language.

2. Third Party Beneficiary Actions

In a few cases plaintiffs have attempted to circumvent the "no private right of action" rule by claiming that they had the right to sue federal contractors as third party beneficiaries of contracts between such contractors and the government. Courts have rejected this claim. In *Howard v. Uniroyal, Inc.*[143] the Eleventh Circuit ruled that the remedy that Congress provided in detail when enacting Section 503(b) was intended to be the sole means of enforcing the affirmative action clause in such contracts. Similarly, in *Davis v. United Airlines, Inc.*[144] the district court held that allowing a plaintiff to sue the contractor as a third party beneficiary under a government contract would allow the plaintiff to make an end run around a statute (Section 503) that does not give the plaintiff the right to sue. And, in *D'Amato v. Wisconsin Gas Co.*[145] the Seventh Circuit held that because the main purpose of a government contract is not related to the affirmative action clause, but is premised on the government-contractor relationship, a disabled person could not claim to be the third party beneficiary of such a contract. Similar reasoning was applied in *Chaplin v. Consolidated Edison Co.*[146]

3. Section 1983 Actions

Section 1983[147] provides that any person who, acting under color of state law, subjects any United States citizen to the deprivation of any right secured by federal law may be held liable to the injured party. In a few cases plaintiffs have filed actions under Section 1983 to protest the deprivation of a right secured by Section

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[142] 611 F.2d 1074 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980).

[143] 719 F.2d 1552 (11th Cir. 1983).

[144] 575 F. Supp. 677 (E.D.N.Y. 1983).

[145] 760 F.2d 1474 (7th Cir. 1985).

[146] 579 F. Supp. 1470 (S.D.N.Y. 1984). *See also*, *Hoopes v. Equifax, Inc.*, 611 F.2d 134 (6th Cir. 1979) (rejecting the plaintiff's third-party beneficiary claim because no private right of action exists under Section 503); *Hodges v. Atchison, Topeka and Santa Fe Ry.*, 728 F.2d 414, 416 (10th Cir.) (plaintiff's third party beneficiary claim was "but another aspect of the implied right of action argument" which the court denied), *cert. denied*, 469 U.S. 822 (1984); *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1080 n.5 (5th Cir.) (if plaintiff had asserted an action as a third-party beneficiary, the court would "need to consider whether implication of a third-party beneficiary claim turns on the same considerations as implication of a private cause of action"), *cert. denied*, 449 U.S. 889 (1980).

[147] 42 U.S.C.A. §1983 (1981).

503. In *Meyerson v. Arizona*[148] the Ninth Circuit held that the plaintiff could not circumvent the "no private right of action rule" by asserting his Section 501 claim via a Section 1983 action against a state agency. The court ruled that Section 1983 is not applicable to statutory violations: "(1) where Congress has foreclosed private enforcement of that statute in the enactment itself, and (2) where the statute does not create 'enforceable rights.' "[149] The court held that the latter principle applied to claims under Section 503 because Congress foreclosed private enforcement of that Section when it provided a comprehensive remedial scheme under the authority of the DOL.

Another case in which the plaintiffs attempted to assert a claim under Section 1983 is *Brown v. Sibley.*[150] The defendant in that case was the Mississippi Industries for the Blind, a state agency that operated from profits realized from the sale of its manufactured products through government procurement contracts. The Fifth Circuit held that the blind plaintiffs could not assert a cause of action against their employer under Section 1983 based on a deprivation of rights guaranteed under Section 503. The court reasoned that the only right Section 503 gives handicapped people is the right to file complaints with the DOL. Thus, the only Section 503 deprivation which the plaintiffs could pursue would arise in a hypothetical situation in which some member of the Mississippi Industries executive staff interfered with the plaintiffs' right to file complaints with the DOL.[151]

4. Actions To Enforce Conciliation Agreements

At least one court has held that a handicapped employee who is named as a beneficiary of a conciliation agreement entered into between a federal contractor and the Office of Federal Contract Compliance Programs (OFCCP) of the DOL pursuant to a Section 503 investigation could assert a cause of action against the contractor for failure to abide by the terms of the agreement. In *McBee v. Mack Trucks, Inc.*[152] the court noted that the plaintiff was not seeking to enforce the affirmative action clauses of the original government contract, but was seeking to enforce the conciliation agreement.

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[148] 709 F.2d 1235 (9th Cir. 1983), *vacated and remanded on other grounds*, 465 U.S. 1095 (1984), *on remand*, 740 F.2d 684 (9th Cir. 1984).

[149] 709 F.2d at 1238 (quoting *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 19 (1981).

[150] 650 F.2d 760 (5th Cir. 1981).

[151] The court also noted that a plaintiff cannot utilize Section 1983 to enforce the obligation of a DOL official to enforce Section 503, because a DOL official is a federal official acting under color of federal law, not a state official acting under color of state law. 650 F.2d at 765 n.4.

See also, D'Amato v. Wisconsin Gas Co., 760 F.2d 1474 (7th Cir. 1985) (disabled plaintiff could not file an action against a contractor and the government under 42 U.S.C. §1985(3) based on a conspiracy to interfere with his rights under Section 503 since Section 1985(3) does not evidence a concern for handicapped people).

[152] 655 F. Supp. 1459 (D. Md. 1987).

5. Administrative Procedures and Remedies

A disabled person's only recourse against a government contractor under Section 503 is to file a written complaint with the OFCCP within 180 days of the purported violation.[153] The OFCCP is required to investigate the complaint and attempt to resolve the matter.[154] If the OFCCP finds that the contractor violated Section 503, the OFCCP is required to attempt to secure compliance "through conciliation and persuasion within a reasonable time."[155] For the contractor to come into compliance with the Act "it must make a specific commitment, in writing, to take corrective action. . . ."[156] The written commitment must specify the "precise action to be taken and dates for completion."[157] The time period to remedy violations of the Act "should be no longer than the minimum period necessary to effect such changes."[158] If the OFCCP approves the contractor's commitments, the contractor will be considered in compliance with Section 503 so long as the commitments are met.[159]

If the OFCCP is not able informally to resolve the matter with the contractor through conciliation and persuasion, a formal hearing is held.[160] If a violation is established at the hearing, the OFCCP may order the contractor to comply with the

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[153] 41 C.F.R. §60-741.26 (1989). The OFCCP may also file an action against a federal contractor on its own initiative. *See United States Department of Labor v. Southern Pacific Transportation Co.*, OFCCP Cases No. 79-OFC-10A, 79-OFC-10B, 79-OFC-17, 79-OFC-19, and 80-OFC-17 (Recommended Decision and Order dated November 9, 1982) (the OFCCP was authorized to bring proceedings on behalf of nine individuals who did not file complaints against their federal contractor employer).

[154] 41 C.F.R. §60-741.26(e) and (g) (1989).

[155] 41 C.F.R. §60-741.26(g)(2) (1989). The OFCCP has stated that the mandatory conciliation requirement intends that the agency "function as a mediator between the aggrieved workers or job applicants and the accused employers, attempting to persuade one or the other or both to accept a reasonable settlement in accordance with the purpose of the statute." [*U.S. Department of Labor v. Southern Pacific Transportation Co.*, OFCCP Cases No. 79-OFC-10A, 79-OFC-10B, 79-OFC-17, 79-OFCP-19, 80-OFC-17 (Recommended Decision and Order dated November 9, 1982, p.19)]. The OFCCP further stated that while conciliation efforts need not be exhaustive, they must continue for at least as long as they are fruitful. [*Id.* at 20] The agency is not required to volunteer to back down from its position, and the failure to do so, "particularly in the absence of sign [sic] of reciprocation, does not prove lack of good faith." [*Id.* at 25]

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] 41 C.F.R. §60-741.29(a)(1) (1989).

Section 503 regulations and to take corrective action, such as offering employment to a complaining applicant and also awarding back pay.[161] Other options available to the OFCCP upon establishing a violation are to file suit against the contractor in federal court, withhold payments due on existing federal contracts, terminate existing federal contracts with the contractor in whole or in part, and/or bar the contractor from receiving future federal contracts.[162] If the OFCCP chooses to file suit in federal court, it may seek "appropriate injunctive relief" to ensure that the contractor fulfills its affirmative action requirements towards handicapped people.[163]

6. Actions Against the OFCCP

Several courts have held that a handicapped individual may sue the DOL to compel institution of Section 503 administrative enforcement proceedings against a federal contractor-employer. In *Moon v. Secretary, United States Department of Labor*[164] Roadway Express Company terminated the employment of Moon, who was an amputee. Moon filed a complaint under Section 503 with the OFCCP. After investigating Moon's complaint, the OFCCP concluded that Roadway violated Section 503. The OFCCP invited Roadway to settle the matter informally and referred the case to the DOL's Office of the Solicitor. The Solicitor, however, determined that Moon's termination was a valid exercise of Roadway's management discretion. Based on that decision the OFCCP closed the case. Moon sought judicial relief by challenging both the OFCCP's decision to refer the case to the Solicitor of Labor and the DOL's decision not to pursue the case. The Eleventh Circuit held that Moon had the right to file suit against the DOL under the Administrative Procedures Act (APA).[165]

With respect to the OFCCP's decision to refer the case to the Solicitor of Labor prior to deciding whether to bring administrative action against Roadway, the Eleventh Circuit held that an administrative agency has inherent discretion to solicit the view of its legal staff, particularly since it is those attorneys who have responsibility for the enforcement proceedings. The court also stated that " '[n]othing in the Administrative Procedure Act prohibits an agency from changing its mind, if that change aids it in its appointed task.' "[166] With respect to the Solicitor's determination not to press the case, the Eleventh Circuit held that under the APA that decision could only be overturned if it was " 'arbitrary' or 'capricious'."[167]

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[161] *See, e.g., E.E. Black, Ltd. v. Marshall,* 497 F. Supp. 1088 (D. Haw. 1980), *vacated on other grounds,* 26 Fair Empl. Prac. Cas. (BNA) 1183 (D. Haw. 1983).

[162] 41 C.F.R. §60-741.28(b)-(e) (1989).

[163] 41 C.F.R. §60-741.28(b) (1989).

[164] 747 F.2d 599 (11th Cir. 1984), *cert. denied,* 471 U.S. 1055 (1985).

[165] 5 U.S.C.A. §§701-706 (1977).

Similarly, in *Costner v. United States*[168] the plaintiff filed an action under the APA requesting the court to review the DOL's decision not to file a complaint under Section 503 against his employer, a government contractor. The court allowed the action, but held that the DOL's decision was not arbitrary or capricious.[169]

In *Pace v. Donovan*,[170] however, the court relied on authority other than the APA in allowing blind employees terminated from their positions to file suit to compel the Secretary of Labor to require their employer to re-hire them or lose its government contracts. The court held that the plaintiffs had standing to sue under the federal Mandamus Act, which gives federal district courts jurisdiction "in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."[171] The court found, however, that the OFCCP had not acted in an arbitrary or capricious manner when it decided not to pursue enforcement of the employees' complaints against the contractor, and thus refused to issue a writ of mandamus.[172]

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[166] 747 F.2d at 604 (citing *American Petroleum Institute v. EPA*, 661 F.2d 340, 355 (5th Cir. 1981)).

[167] 747 F.2d at 605. The Administrative Procedures Act, 5 U.S.C.A. §706(2)(A) (1977), provides that a court shall set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

[168] 555 F. Supp. 146 (E.D. Mo. 1982), *rev'd on other grounds*, 720 F.2d 539 (8th Cir. 1983).

[169] *See also, Presinzano v. Hoffman-La Roche, Inc.*, 726 F.2d 105 (3rd Cir. 1984) (plaintiff had standing under the APA to seek reversal of the OFCCP's decision not to initiate enforcement proceedings against his federal contractor employer; arbitrary or capricious test held not satisfied); *E.E. Black Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Haw. 1980) (plaintiff had standing under the federal question proviso, 28 U.S.C. §1331, and the APA to seek review of the decision of the Assistant Secretary of Labor relating to plaintiff's case), *vacated on other grounds*, 26 Fair Empl. Prac. Cas. (BNA) 1183 (D. Haw. 1983); *Vislisel v. Department of Labor*, 21 Fair Empl. Prac. Cas. (BNA) 981 (N.D. Iowa) (plaintiff had standing under the APA to request review of the DOL's decision that his federal contractor employer had not discriminated against him on the basis of handicap; arbitrary or capricious test held not satisfied), *aff'd without opinion*, 605 F.2d 1209 (8th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980); *Thompson v. U.S. Department of Labor*, 813 F.2d 48 (3d Cir. 1987) (the district court has a duty under the APA to compel agency action under Section 503 unlawfully withheld or unreasonably delayed; thus the plaintiff properly filed an action under the APA protesting the OFCCP's postponement of action on the plaintiff's case for seven years) (because a Section 503 plaintiff has an adequate remedy under the APA, the plaintiff is not entitled to mandamus relief under 28 U.S.C. §1361).

One court has held, however, that a decision by the DOL not to file an action under Section 503 is *not* subject to judicial review under the APA. In *Andrews v. Consolidated Rail Corporation*, 831 F.2d 678, 686 (7th Cir. 1987), the Seventh Circuit stated:

> In enacting [S]ection 503 . . . Congress neither provided substantive priorities nor limited the Department of Labor's discretion in choosing which claims to pursue. The unambiguous language in both [S]ection 503 and its implementing regulations makes clear that this is not an appropriate case for judicial review since the Department of Labor's decision whether or not to prosecute a handicap discrimination claim is more properly committed to its sound discretion.

[170] 35 Empl. Prac. Dec. (CCH) ¶34,924 (D.D.C. 1984).

It is extremely difficult to show that an agency's action was arbitrary or capricious. Thus, disabled applicants and employees will rarely succeed in their attempts to compel the DOL to enforce Section 503. As a practical matter, therefore, the DOL's administrative decision in a given case will usually be the final word on the issue.[173]

B. Regulatory Requirements

The Section 503 regulations promulgated by the DOL's OFCCP[174] contain the following significant provisions:

1. The term "Government Contract" is defined as

> any agreement or modification thereof between any contracting agency and any person for the furnishing of supplies or services or for the use of real or personal property including lease agreements.[175]

The term "services" as used in that definition is held to include, but is not limited to, such services as "[u]tility, construction, transportation, research, insurance, and fund depository, irrespective of whether the government is the purchaser or seller."[176] Government contracts do *not* include "agreements in which the parties stand in the relationship of employer and employee," or "federally-assisted contracts."[177]

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[171] 28 U.S.C.A. §1361 (1976).

[172] The *Pace* court's reliance on the Mandamus Act to grant standing to the plaintiff is somewhat contradictory to that of the district court in *Moon v. Donovan*, 29 Fair Empl. Prac. Cas. (BNA) 1780, 1783 (N.D. Ga. 1982), *aff'd, Moon v. Secretary, U.S. Department of Labor*, 747 F.2d 599 (11th Cir. 1984), cert. denied, 741 U.S. 1055 (1985). In *Moon v. Donovan* the district court held that the plaintiff "lack[ed] jurisdiction under the Mandamus Act" to compel the DOL's enforcement of Section 503. The court noted that before mandamus may issue "the plaintiff must have a clear right to relief" which the plaintiff did not have because the DOL's actions under Section 503 are discretionary. While neither the *Pace* court nor the *Moon* court issued the requested writs of mandamus, the *Pace* court held that the Mandamus Act gave the plaintiff standing to sue, while the *Moon* court implied that the Mandamus Act did not give the plaintiff standing to sue.

[173] In at least one case, however, a court found the OFCCP's denial of a disabled employee's complaint to be arbitrary, capricious and contrary to law. In *Healy v. Bergman*, 609 F. Supp. 1448 (D. Mass. 1985), the OFCCP dismissed an alcoholic plaintiff's complaint based on a "recent ruling indicating that alcoholics who are receiving treatment for alcoholism are not considered to be qualified handicapped individuals under Section 503. . . ." [609 F. Supp at 1455] Healy filed an action under the APA challenging the regional OFCCP's decision. The court ruled that the regional OFCCP's conclusion was arbitrary, capricious and contrary to law, because the "ruling" upon which it relied did not exist. Due to incomplete records, however, the court was unable to apply this finding to the OFCCP's national office. Thus, the court remanded the case to the Director of the OFCCP for further investigation and a documented conclusion within 60 days.

[174] 41 C.F.R. §§60-741.1-741.54 (1989).

[175] 41 C.F.R. §60-741.2 (1989).

2. The term "handicapped individual" is defined similarly to the manner in which that term is defined under Sections 501 and 504.[178] For purposes of Section 503, however, a handicapped individual is deemed to be "substantially limited" in a major life activity "if he or she is likely to experience difficulty in securing, retaining or advancing in employment because of a handicap."[179]

3. A "qualified handicapped individual" is defined as a handicapped person "who is capable of performing a particular job, with reasonable accommodation to his or her handicap."[180]

4. A contractor is required to "make a reasonable accommodation to the physical and mental limitations of an employee or applicant unless the contractor can demonstrate that such an accommodation would impose an undue hardship on the conduct of the contractor's business."[181] When evaluating whether the undue hardship test has been satisfied "the following factors among others may be considered: (1) Business necessity and (2) financial cost and expenses."[182]

5. A contractor is required to adhere to a planned "schedule for the review of all physical or mental job qualification requirements" to ensure that such requirements are "job related" and "consistent with business necessity and the safe performance of the job."[183] When a contractor applies physical or mental qualifications to affect a disabled applicant's or employee's employment status, the contractor bears the burden of proving job relatedness and business necessity.[184]

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[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] 41 C.F.R. §60-741.6(d) (1989).

[182] *Id.*

[183] 41 C.F.R. §60-741.6(c)(1) (1989).

[184] 41 C.F.R. §60-741.6(c)(2) (1989). One court has held that this regulatory provision supersedes any otherwise applicable burdens of proof in a Section 503 action where job qualifications are at issue. ***See, E.E. Black v. Donovan***, 26 Fair Empl. Prac. Cas. (BNA) 1183, 1184 (D. Haw. 1981) (Title VII burdens of proof as set forth in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981), inapplicable to a Section 503 action involving job qualifications because "the regulations implementing [S]ection 503 provide the standard that the contractor must meet and allocate the full burden to the contractor").

6. Contractors are prohibited from reducing the amount of compensation offered to handicapped applicants or employees "because of any disability income, pension or other benefit the applicant or employee receives from another source."[185]

7. Contractors are required to take specific affirmative "outreach and positive recruitment activities" to ensure the employment and advancement of qualified handicapped individuals, including: (a) developing internal communication techniques to inform its employees of its affirmative action obligations; (b) developing internal procedures to ensure that its affirmative action obligations are being enacted; (c) enlisting the assistance and support of recruiting sources such as state employment agencies, state education and labor agencies, state vocational rehabilitation agencies, college placement offices and sheltered workshops; (d) engaging in recruitment activities at educational institutions that train handicapped persons; (e) establishing meaningful contacts with appropriate social service and other agencies; (f) reviewing employment records to determine the availability of promotable and transferrable handicapped individuals presently employed; (g) including handicapped workers in advertising materials; (h) requesting appropriate action on the part of all subordinates, vendors and suppliers; and (i) taking positive steps to attract qualified handicapped persons.[186]

8. Each contractor is required to take specifically enumerated steps to adopt, implement and disseminate its affirmative action policy internally.[187]

9. Each contractor must designate an executive to serve as director or manager of company affirmative action activities.[188]

10. Contractors and subcontractors must ensure "that no person intimidates, threatens, coerces, or discriminates against any individual for the purpose of interfering with the filing of a complaint, furnishing information, or assisting or participating in any manner in an investigation, compliance review, hearing, or any other activity related to the administration of [Section 503]."[189]

11. Every contractor and subcontractor must permit access during normal business hours to its places of business, books, records, and accounts for purposes of investigation of performance or complaints.[190]

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[185] 41 C.F.R. §60-741.6(e) (1989).

[186] 41 C.F.R. §60-741.6(f) (1989).

[187] 41 C.F.R. §60-741.6(g) (1989).

[188] 41 C.F.R. §60-741.6(h) (1989).

[189] 41 C.F.R. §60-741.51 (1989).

[190] 41 C.F.R. §60-741.53 (1989).

C. Attorneys' Fees

Section 505(b) of the Rehabilitation Act allows a court to award attorneys' fees and costs to the prevailing party in any action or proceeding to charge or enforce a violation of the Act.[191]

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[191] 29 U.S.C.A. §794a(b) (1985). For a discussion of this section, which applies in equal fashion to actions under Sections 501, 503 and 504, *see* chapter 8 of this text and section I(E) of this chapter, *supra*. Because no private right of action exists under Section 503, however, the attorneys' fee provision will have little applicability to that section.

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Access to Transportation

I. Mass Ground Transportation

A. Overview

Prior to the enactment of the Americans with Disabilities Act (ADA),[1] four federal statutes related to the obligation of transit companies to provide accessible mass transit—via bus, rail or other means of ground transportation—for disabled Americans:

First, in 1970 Congress enacted Section 16(a) of the Urban Mass Transportation Act (UMTA),[2] which declares a national policy that elderly and handicapped persons have the same right as other persons to use mass transit. This Act mandates the undertaking of special efforts in the planning and design of facilities and services to ensure that usable mass transit is available to elderly and handicapped persons. The UMTA requires "all Federal programs offering assistance in the field of mass transportation . . . [to] contain provisions implementing this policy."[3]

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[1] *See* 136 *Cong. Rec.* H4582-96 (July 12, 1990). For a comprehensive analysis of the ADA *see* chapter 12 of this text, *infra*.

[2] 49 U.S.C.A. §1612(a) (1976). That Section provides:

> (a) It is hereby declared to be the national policy that elderly and handicapped persons have the same right as other persons to utilize mass transportation facilities and services; that special efforts shall be made in the planning and design of mass transportation facilities and services so that the availability to elderly and handicapped persons of mass transportation which they can effectively utilize will be assured; and that all Federal programs offering assistance in the field of mass transportation (including the programs under this chapter) should contain provisions implementing this policy.

[3] *Id.*

Second, in 1975 Congress amended Section 165(b) of the Federal-Aid Highway Act[4] to provide for the funding of public transportation projects through federal financial assistance, and to require that projects funded under the Act be constructed and operated to allow effective use by handicapped persons.

Third, because most transit systems receive some form of federal financial assistance, they are subject to the antidiscrimination mandate of Section 504.

Fourth, in 1982 Congress amended the UMTA to add Section 317(c) of the Surface Transportation Assistance Act of 1982,[5] which required the Secretary of Transportation to promulgate regulations under the three previously named acts establishing: "(1) minimum criteria for the provision of transportation services to handicapped and elderly individuals . . . and (2) procedures for the Secretary to monitor recipients' compliance with such criteria."[6]

To implement these four laws, the United States Department of Transportation (DOT) promulgated several sets of regulations. In 1976 the DOT promulgated regulations requiring that the planning process with respect to transportation efforts funded by the UMTA must incorporate "special efforts" to provide services to handicapped people that are equivalent to the services provided to nonhandicapped people.[7] These regulations provided alternative means of satisfying the special efforts requirement, including: (1) providing a program for handicapped people involving annual average expenditures of 5 percent of the total UMTA expenditures; (2) purchasing only wheelchair accessible fixed-route vehicles until half of the fleet was wheelchair accessible, or developing a comparable alternative; or (3) implementing a system that would guarantee every wheelchair user or semi-ambulatory person transportation for ten round trips per week at prices charged for standard services (*i.e.*, the provision of "paratransit" services).[8]

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[4] Pub. L. No. 93-87 §165, as amended by Pub. L. No. 93-643 §105(b), January 4, 1975, 88 Stat 2283, noted in 23 U.S.C.A. §142 (1990). That Section provides:

> The Secretary of Transportation shall require that projects receiving Federal financial assistance . . . shall be planned, designed, constructed and operated to allow effective utilization by elderly or handicapped persons who, by reason of illness, injury, age, congenital malfunction, or other permanent or temporary incapability or disability . . . are unable without special facilities or special planning or design to utilize such facilities and services effectively. The Secretary shall not approve any program or project to which this section applies which does not comply with the provisions of this subsection requiring access to public mass transportation facilities, equipment, and services for elderly or handicapped persons.

[5] 49 U.S.C.A. §1612(d) (1976 and West Supp. 1990).

[6] *Id.*

[7] 41 *Fed. Reg.* 18,234 (1976).

[8] *Id.* For an explanation of "paratransit" services, *see* note 33 of this chapter, *infra*.

Also, in 1976 President Gerald Ford ordered the Department of Health, Education and Welfare (HEW)[9] to establish guidelines for all agencies to implement Section 504.[10] In accord with that order, HEW issued guidelines in 1978.[11] The HEW guidelines provided that all recipients of federal financial assistance should integrate handicapped people into the same programs offered to nonhandicapped people rather than providing separate programs for handicapped people.[12] The 1976 DOT regulations purportedly violated the "mainstreaming" requirement of the HEW guidelines by sanctioning the provision of separate transit services for handicapped persons as an alternative to accessible bus and rail systems. Accordingly, in 1979 the DOT rescinded the 1976 regulations and enacted new regulations.[13]

The 1979 DOT regulations required transit systems receiving federal financial assistance to make every mode of public transportation accessible to handicapped persons by May 31, 1982.[14] These regulations permitted transit systems to take up to 30 years to make "extraordinarily expensive" structural changes to, or replacements of, existing vehicles or facilities.[15] But they required all buses purchased after July 2, 1979 to have wheelchair lifts, and all systems to have half their buses accessible to wheelchair users after ten years.[16] Further, subways and other rail systems were required to be retrofitted with elevators and "gap-closing" equipment to enable wheelchair users to board trains.[17]

The 1979 DOT regulations were challenged in *American Public Transit Association v. Lewis*.[18] In that case, the District of Columbia Circuit held that the requirements set forth in the 1979 regulations were not authorized by Section 504 because they imposed "extremely heavy burdens on local transit authorities."[19] Following that decision, the DOT published interim regulations in 1981.[20]

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[9] HEW (along with the former Department of Education) is now the Department of Health and Human Services (DHHS).

[10] Exec. Order No. 11,914, 41 *Fed. Reg*. 17,871 (1976).

[11] 43 *Fed. Reg*. 2132 (1978), 45 C.F.R. §§85.1-85.58 (1980).

[12] 43 *Fed. Reg*. at 2134, 2138-39 (1978), 45 C.F.R. §§85.56, 85.57 (1980).

[13] 44 *Fed. Reg*. 31,468 (1979), 49 C.F.R. §§27.1-27.129 (1980).

[14] 44 *Fed. Reg*. 31,442, 31,477-79 (1979); 49 C.F.R. §§27.83-27.95 (1980).

[15] *Id*.

[16] 44 *Fed. Reg*. at 31,478 (1979); 49 C.F.R. §27.85 (1980).

[17] 44 *Fed. Reg*. at 31,478-79 (1979); 49 C.F.R. §§27.87-27.89 (1980).

[18] 655 F.2d 1272 (D.C. Cir. 1981).

[19] 655 F.2d at 1278.

[20] 46 *Fed. Reg*. 37,488 (1981).

Basically, the 1981 regulations eliminated the requirement that all mass transit systems be made accessible and returned to the 1976 "special efforts" standard. The 1981 regulations deleted Part E of 49 C.F.R. Part 27 and substituted a new section 27.77 in Subpart D.[21] The new section 27.77 addressed mass transportation services as well as mass transportation facilities.[22] This section established alternative criteria for meeting the special efforts requirements similar to those set forth in the 1976 regulations.[23] The 1981 regulations, as amended in 1986,[24] remain in effect today.[25]

Subpart C of the current DOT regulations mandates that all newly built facilities or newly built parts of facilities shall be designed, constructed and operated in such a manner as to be "accessible to and usable by handicapped persons. . . ."[26] Newly purchased or leased vehicles are also required to be accessible to handicapped persons.[27] Subpart D of the regulations sets forth the requirements for the accessibility of airport terminals,[28] railroad terminals[29] and highway rest area facilities.[30]

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[21] *Id.*

[22] 46 *Fed. Reg.* 37,492 (1981).

[23] 46 *Fed. Reg.* 37,488, 37,492-94 (1981).

[24] 51 *Fed. Reg.* 18,994, 19,017-21 (1986).

[25] 49 C.F.R. §§27.1-27.129 (1989). Section 27.77 of Part D of the 1981 regulations has been moved to section 27.95 of Part E of the current regulations.

[26] 49 C.F.R. §27.67(a) (1989).

[27] *Id.*

[28] 49 C.F.R. §27.71 (1989). For a discussion of issues relating to airlines and airline terminals, *see* section II of this chapter, *infra*.

[29] 49 C.F.R. §27.73 (1989). Basically, this section provides that newly constructed facilities or portions thereof must meet specific accessibility requirements with respect to station circulation and flow, ticketing systems, baggage check-in and retrieval systems, boarding platforms, vehicular loading and unloading areas and parking facilities. Telephones for hard-of-hearing persons must be readily available, and a toll-free reservation and information number with teletypewriter (TTY or TDD) capabilities must be available for use by hearing and speech impaired persons. Existing facilities are required to be modified to ensure that, when "viewed in their entirety," they are "readily accessible to and usable by handicapped persons." Within five years from the effective date of this section recipients must make accessible at least one station in each Standard Metropolitan Statistical Area (SMSA), as well as all stations located outside of an SMSA where such stations are not located within 50 highway miles of an accessible station. Within ten years from the effective date of this section all other stations, both inside and outside each SMSA, are to be made accessible. Within five years from the effective date of this part at least one coach car, one sleeper car and one restaurant car are required to be accessible to disabled people. All newly purchased or leased rail passenger vehicles are required to be accessible to handicapped persons. [Note that except for minor changes in 1986 (51 *Fed. Reg.* 19017, (1986)), this regulation went into effect July 2, 1979. *See*, 44 *Fed. Reg.* 31442 (1979)].

[30] 49 C.F.R. §27.75 (1989). In general, this section requires all highway rest area facilities that are newly constructed or altered with federal financial assistance to be accessible to handicapped persons.

Subpart E of the regulations maintains the "local option" provision, by allowing transit companies to meet the criteria set forth in paragraph (b), in paragraph (c) or in paragraph (d) of section 27.95.[31] Paragraph (c) of that section outlines criteria for transit authorities to follow when providing accessible buses for disabled persons;[32] paragraph (b) outlines criteria for the provision of "special service" systems for disabled persons;[33] paragraph (d) outlines criteria for the provision of "mixed systems to serve disabled people."[34]

Thus, transit authorities are permitted to choose any one of three means of providing ground transportation services for disabled persons. Subpart E further provides, however, that a transit company is *relieved* of its obligation to provide any of these minimum service criteria if it spends 3 percent of the "total annual average operating costs . . . it reasonably expects to incur in the current fiscal year and did incur during the previous two fiscal years."[35] Thus, even if a recipient does not provide services to handicapped persons that satisfy any of the minimum criteria set forth in section 27.95, a recipient transit company is excused from that

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In addition, this section requires: (1) all pedestrian crosswalks constructed with federal financial assistance to have curb cuts or ramps to accommodate persons in wheelchairs, and (2) pedestrian overpasses, underpasses and ramps constructed with federal financial assistance to be accessible to handicapped persons unless "[a]lternate safe means are provided to enable mobility-limited persons to cross the roadway at that location," or unusual topographical or architectural obstacles unrelated to such facilities make it infeasible for mobility-limited persons to reach such facilities.

[31] 49 C.F.R. §27.95 (1989).

[32] Transit companies opting to provide accessible bus service for disabled riders must provide accessible buses only on those routes "on which a need for accessible bus service has been established through the planning and public participation process" explained elsewhere in the regulations [49 C.F.R. §27.95(c)(2) (ii) (1989)], and *only* at such "reasonable intervals that make practicable the ready use of the accessible bus service by handicapped persons" [49 C.F.R. §27.95(c)(2)(i) (1989)]. The number of accessible buses a recipient is required to maintain is that number sufficient to meet the above two criteria [49 C.F.R. §27.95(c)(1) (1989)].

[33] "Special service" systems, otherwise known as "paratransit" systems, are those that provide transportation services to disabled riders on an "on-call" basis via car, van, taxi or other means of ground transportation, as opposed to via fixed bus routes utilized by the general public.

Transit companies opting to utilize the special service method of providing transportation services to disabled people must provide such services in the area in which—and during the hours at which—the recipient provides bus services to the general public. Fares for special services must be comparable to fares for regular buses, and restrictions based on trip purposes are not permissible. Disabled users must request the provision of "special services" 24 hours in advance, however [49 C.F.R. §27.95(b)(2) (1989)], and they are precluded from traveling with non-disabled companions, since only disabled persons may utilize such special services [49 C.F.R. §27.95(b)(1) (1989)].

[34] Transit companies opting to provide accessible bus service via a "mixed system" must "ensure that the accessible bus and special service components of the mixed system are coordinated (including transfers between the components) so that inconvenience to handicapped users of the mixed system is minimized." 49 C.F.R. §27.95(d) (1989).

[35] 49 C.F.R. §29.97(a) (1989).

responsibility once it has spent 3 percent of its average operating costs on transportation services for disabled people.[36]

B. Validity of the 1986 DOT Regulations

In *Americans Disabled for Accessible Public Transportation (ADAPT) v. Skinner*[37] the plaintiffs objected to the DOT regulations implementing the federal transportation statutes on several grounds. First, the plaintiffs claimed that the DOT regulations violated the mainstreaming mandate of the transportation statutes by authorizing the confinement of disabled transit riders to segregated specialized transportation facilities via the local option approach that allows transit companies to provide paratransit services. Second, the plaintiffs objected to the 3-percent-of-the-operating-costs "safe harbor cost limit" as contrary to the intent of the federal statutes, particularly the UMTA, and as arbitrary and capricious. Third, the plaintiffs claimed that the regulations were themselves conflicted, since the provision in Subpart C requiring that all newly purchased or leased vehicles be accessible to handicapped persons[38] was contradicted by the local option provisions of Subpart E.[39] A discussion of each of those issues follows:

1. Mainstreaming

The federal district court in *ADAPT v. Skinner*[40] found that none of the federal statutes dealing with transportation evidenced a "Congressional mandate to mainstream handicapped persons' transportation. . . ."[41] Thus, that court held that the "local option" provisions of Subpart E of the regulations[42] were in accord with the statute. On appeal, the Third Circuit initially reversed the district court's opinion with respect to the mainstreaming issue, holding instead that the regulations *did* violate the mainstreaming mandate.[43] Following a hearing *en banc*, however, the Third Circuit affirmed the district court's ruling with respect to the mainstreaming question.[44] After exhaustively analyzing all of the federal laws related to transportation, the Third Circuit held that none of those statutes "mandate mainstreaming, or, in other words, the total revamping of a mass-transit system so that it can accommodate the handicapped in the same facilities and on the same terms as other people."[45]

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[36] 49 C.F.R. §29.97(b) (1989).

[37] 676 F. Supp. 635 (E.D. Pa. 1988), *aff'd in part and rev'd in part*, 867 F.2d 1229 (3d Cir. 1989), *vacated and rehearing en banc granted*, 871 F.2d 1229 (3d Cir.), *cert. denied*, 110 S. Ct. 87 (1989), *aff'd*, 881 F.2d 1184 (3d Cir. 1989).

[38] 49 C.F.R. §27.67(a) (1989). *See* note 26 of this chapter, *supra*.

[39] 49 C.F.R. §27.95 (1989). *See* notes 31-35 of this chapter, *supra*.

[40] *See* 676 F. Supp. 635 (E.D. Pa. 1988) (at that time the case was entitled *ADAPT v. Dole*).

[41] 676 F. Supp. at 639.

[42] *See* notes 31-34 of this chapter, *supra*.

[43] *Americans Disabled for Accessible Public Transportation (ADAPT) v. Burnley*, 867 F.2d 1471 (3d Cir. 1989), *vacated and rehearing en banc granted*, 871 F.2d 1229 (3d Cir.), *cert. denied*, 110 S. Ct. 87 (1989).

With respect to cost concerns, the district court in *ADAPT v. Skinner* held that cost is a valid consideration when determining the *extent* of accessible transportation services to be provided for handicapped persons. The district court held that since the statutory language of Section 504, the UMTA and the Federal-Aid Highway Act does not contain a "list of factors to be considered by the agency, nor language excluding factors from consideration, nor [language] specifying the quality of service to be achieved . . .," the Secretary of the DOT "has discretion to consider the cost of compliance" with the DOT regulations.[46]

In affirming the district court's opinion on rehearing *en banc*, the Third Circuit agreed that "the Secretary's decision to allow communities the option of providing alternatives to accessible bus service is adequately supported by record evidence of the relative costs and benefits."[47] Because there was "evidence showing that the paratransit systems already operated by many communities could offer more cost-effective service, while providing advantages that cannot be provided by accessible bus service alone,"[48] the Third Circuit held that "the provisions permitting paratransit alternatives are a rational exercise of the Secretary's discretion. . . ."[49] The court noted, however, that:

> We admit to some discomfort with our conclusion, because ADAPT has forcefully argued that a system that is wholly paratransit results in rather serious restrictions on spontaneous travel for the disabled. The regulations provide for 24 hour response time for para-transit services. . . . Therefore, the disabled may have great difficulty in attending social events or getting to work on short notice where the system is not fully accessible. Despite our unease in

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[44] 881 F.2d 1184 (3d Cir. 1989) (*en banc*).

[45] 881 F.2d at 1196. Several other courts have held that Section 504 does not require mainstreaming of disabled persons with respect to transportation. *See, e.g., Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority*, 718 F.2d 490, 494-99 (1st Cir. 1983); *American Public Transportation Association v. Lewis*, 655 F.2d 1272, 1277-78 (D.C. Cir. 1981); *Disabled in Action of Baltimore v. Bridwell*, 593 F. Supp. 1241, 1250-52 (D. Md. 1984), *appeal dismissed*, 820 F.2d 1219 (4th Cir. 1987). *See also, Vanko v. Finley*, 440 F. Supp. 656, 663 n.11 (N.D. Ohio 1977) (citing "evidence that Congress did not intend the Rehabilitation Act to require that all handicapped individuals be fully integrated into main-stream mass transit systems").

[46] 676 F. Supp. at 641.

[47] 881 F.2d at 1198.

[48] 881 F.2d at 1199.

[49] *Id.*

> the face of these difficulties, neither the language nor the legislative history of any of the acts at issue here justifies a conclusion that the DOT has acted arbitrarily and capriciously in promulgating the local option provision.[50]

2. The 3 Percent Cost Cap

The district court held in *ADAPT v. Skinner* that the 3 percent cost cap provision violates the mandate of the UMTA and is unreasonable. That court noted that while the Secretary of the DOT may properly consider costs when determining how best to implement the statutes, the Secretary may not, through regulations or otherwise, abrogate entirely the rights granted by those statutes. The district court held that the relevant portion of the UMTA was enacted

> to establish national minimum criteria for the provision of transportation services to the handicapped. While the Secretary should have broad discretion to determine what those criteria ought to be, she may not employ a cost cap to nullify the rights mandated by the Congress.[51]

In addition, the district court found that even if the 3 percent cost cap were permissible, it would be arbitrary and capricious. The DOT's own studies and information showed that if the 3 percent cap were implemented, transit companies serving areas with populations of less than 1,000,000 that chose to implement the paratransit (special service) option would virtually *never* be able to meet the applicable service criteria within the spending cap. Thus, the district court held that to exclude entire portions of the country from congressionally mandated minimum service criteria was arbitrary and capricious. Finally, the district court in *ADAPT v. Skinner* addressed the interpretation of the DOT regulations holding that, as part of the costs calculated when determining whether the 3 percent cost cap had been met, a transit company may include as a cost the revenue lost as a result of offering "half-fare" discounts to elderly and handicapped passengers during off-peak hours.[52] The district court held that the half-fare program, which is part of the National Mass Transportation Act of 1974,[53] is a separate congressionally mandated directive, which should not relieve transit operators of their obligation to

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[50] 881 F.2d at 1199-1200.

[51] 676 F. Supp. at 642.

[52] *See* 676 F. Supp. at 638, 642.

[53] 49 U.S.C.A. §1604(m) (1976). That section provides:

> [t]he Secretary shall not approve any project under this section unless the applicant agrees and gives satisfactory assurances, in such manner and form as may be required by the Secretary and in accordance with such terms and conditions as the Secretary may prescribe, that the rates charged elderly and handicapped persons during non-peak hours for transportation utilizing or involving the facilities and equipment of the project financed with assistance under this section will not exceed one-half of the rates generally

meet minimum service criteria for disabled people. Moreover, the half-fare program benefits only those elderly and handicapped people whose disabilities do not affect their ability to use mass transit; that program does not assist in making mass transit more accessible to disabled people who are unable to use regular public transportation. Thus, the district court held that including the costs of the half-fare program when calculating the 3 percent cap was "contrary to the intention of Congress and was arbitrary and capricious. . . ."[54]

The Third Circuit affirmed the district court's ruling with respect to the 3 percent cost cap. The Third Circuit agreed that "under the safe harbor provision, cities could deny to the disabled the minimum quality of service mandated by the Congress with impunity."[55] Citing the evidence showing that "cities having less than 1,000,000 people in which the transit authorities implemented a transit-only system would virtually never meet all of the applicable service criteria," the Third Circuit held:

> Immunization from compliance for an entire class of cities was not contemplated by Congress. Therefore, we must conclude that the three percent safe harbor provision is arbitrary and capricious.[56]

Thus, the Third Circuit remanded the case to the district court "for determination, after consultation with the parties, of an expeditious timetable for promulgation of regulations in conformity with this opinion."[57]

3. Subpart C Versus Subpart E[58]

Part III (A) of the plurality's opinion in *ADAPT v. Skinner* upon rehearing *en banc* to the Third Circuit dealt with the mainstreaming issue.[59] In affirmance the district

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applicable to other persons at peak hours, whether the operation of such facilities and equipment is by the applicant or is by another entity under lease or otherwise.

[54] 676 F. Supp. at 643. In response to this ruling, on July 26, 1989 the DOT amended the 1976 regulations to exclude the costs of half-fare programs when determining whether providing accommodations for disabled riders would constitute an undue burden to a recipient. *See* 54 *Fed. Reg.* 31,039-41 (1989).

[55] 881 F.2d at 1201.

[56] *Id.* "Transit only" systems refer to systems in which no paratransit options are provided.

[57] 881 F.2d at 1203. As of the date of this writing, no final regulations have been promulgated. Proposed regulations were published on March 26, 1990. 55 *Fed. Reg.* 11120. For a discussion of the proposed regulations *see* text at notes 68-82 of this chapter, *infra*.

[58] As previously noted [*see* text at notes 27 and 31, *supra*], Subpart C mandates that *all* newly purchased or leased vehicles must be accessible to handicapped persons. Subpart E, however, allows transit companies to satisfy their federal obligations to disabled persons by providing *only* paratransit services to disabled users of public transportation.

[59] 881 F.2d at 1191-98.

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court's ruling that the federal transportation statutes do not mandate mainstreaming, the plurality stated:

> [w]e emphasize that we do not reach the issue whether all new purchases by transit authorities must be of accessible buses [as required by Subpart C of the DOT regulations]. . . . ADAPT at no time requested a declaratory judgement that all new purchases must be accessible. Thus we limit our holding to the validity of Subpart E, which by its terms does not speak to new acquisitions, but rather sets the minimum service criteria by which to judge whether transit systems are fulfilling the mandates of the transportation acts.[60]

In dictum, however, the Third Circuit noted that Subpart C of the regulations may require that all newly purchased buses be accessible.[61]

Of the 12 judges on the Third Circuit, only four concurred with Part III(A) of the plurality's opinion in its entirety. In concurring in part and dissenting in part to the plurality's opinion, Judge Mansmann (joined by Judges Higginbotham, Sloviter, and Scirica) opined that:

> [t]he local option format discussed in Subpart E of the regulations allows local authorities to choose a paratransit system as the sole means of providing public transportation to the disabled. This permission afforded by Subpart E nullifies the requirement of Subpart C, which is part and parcel of the final rule, that newly purchased buses accommodate the mobility-impaired. Accordingly, Subpart E must be invalidated.[62]

Following the divided opinion of the *en banc* Third Circuit in *ADAPT v. Skinner,* the plaintiffs went back to the district court and requested that they be permitted to amend their complaint. The district court denied the plaintiffs' motion.[63] That order is currently on appeal to the Third Circuit.[64] Until a court rules otherwise, however, the DOT continues to take the position that the requirement in Subpart C of the regulations that all newly purchased vehicles be accessible to handicapped persons is superseded by the local option provisions set forth in Subpart E of the regulations.[65] The Subpart C requirement relating to accessibility of newly purchased vehicles is not enforced, or held to be enforceable, by the DOT.[66]

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[60] 881 F.2d at 1196. The Third Circuit explained at length that the issue regarding the conflict between Subparts C and E of the regulations had not been properly raised or briefed before the district court, and thus could not be decided on appeal. 881 F.2d at 1197.

[61] *See* 881 F.2d at 1195 n.8 ("[i]n fact, Subpart C of the DOT's regulations, which is not before us, . . . on its face apparently requires that all newly built facilities and newly purchased buses be accessible. *See* 49 C.F.R. 27.67(a)(1987)"). *See also,* the opinion of Judge Greenberg, concurring and dissenting to the plurality's opinion, wherein Judge Greenberg stated that "I cannot join in the view expressed in the plurality's dictum that Subpart C of the regulations may require that all newly purchased buses be accessible since the dictum may be understood to undercut the decision that the statutes and regulations do not mandate mainstreaming." 881 F.2d at 1218.

[62] 881 F.2d at 1204.

[63] *ADAPT v. Skinner,* No. Civ. Act. 86-2989 (E.D. Pa.), Order of October 13, 1989.

[64] *ADAPT v. Skinner,* Docket No. 89-1963, notice of appeal filed with the Third Circuit on November 8, 1989.

4. 1990 Proposed Regulations

Following the Third Circuit's decision in *ADAPT v. Skinner*, on March 26, 1990 the DOT promulgated new proposed regulations under Section 504 concerning federally-assisted mass transit services.[67] The DOT proposed to amend Subpart E of 49 C.F.R. Part 27 as follows:

Section 27.81 of the proposed regulations[68] mandated that all newly purchased or leased passenger fixed-route motor vehicles be accessible to disabled people, and required transit authorities to demonstrate good-faith efforts to ensure accessibility when acquiring used vehicles.[69]

Section 27.85 of the proposed regulations[70] required that all newly purchased or leased vehicles utilized in demand-responsive mass transportation services provided to the general public be accessible to disabled people, unless a transit company can show that its system, when viewed in its entirety, provides services to disabled persons that are equivalent to those services provided to non-disabled persons.[71]

Section 27.87 of the proposed regulations[72] required recipients who operate fixed-route bus transportation systems for the general public to provide supplemental paratransit systems for disabled persons who are unable to use the fixed-route systems *and* persons associated with such disabled individuals.[73] The proposed regulation further provided that when offering such paratransit services, transit companies may not impose restrictions or priorities based on trip purpose and must make service available during the same hours and days, and throughout the same service area, in which fixed-route services are provided.[74] The DOT sought public comment on the question of whether paratransit services should be provided within 24, six or two hours of a request, or within "a time not to exceed the scheduled interval between buses on the bus route relevant to the individual's trip at time the trip would be taken."[75]

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[65] Telephone conversation of February 28, 1990 between Bonnie Tucker and Robert Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation.

[66] *Id.* It is interesting to note, however, that in *Disabled in Action of Pennsylvania v. Sykes*, 833 F.2d 1113 (3d Cir. 1987), *cert. denied*, 485 U.S. 989 (1988), the Third Circuit held that under the 1981 DOT regulations compliance with the special efforts standards of Subpart D of those regulations did not excuse compliance with the requirement in Subpart C that newly constructed *facilities* (as opposed to vehicles) be accessible to disabled people.

[67] 55 *Fed. Reg.* 11,120 (1990).

[68] Proposed regulation 49 C.F.R. §27.81.

[69] 55 *Fed. Reg.* at 11,123-24 (to be codified at 49 C.F.R. §27.81).

[70] Proposed regulation 49 C.F.R. §27.85.

[71] 55 *Fed. Reg.* at 11,124 (1990) (to be codified at 49 C.F.R. §27.85).

[72] Proposed regulation 49 C.F.R. §27.87.

[73] 55 *Fed. Reg.* at 11,124 (1990) (to be codified at 49 C.F.R. §27.85). The purpose of allowing others to utilize the paratransit systems is to allow disabled persons to travel with family, friends and associates.

Section 27.89 of the proposed regulations[76] provided that a transit authority is not required to provide paratransit services to the extent that such provision would impose an undue financial burden.[77] The DOT sought public comment on the question of when an undue financial burden should be deemed to exist. The DOT offered four "options" for determining undue burden: (1) when the expense of operating a supplemental paratransit system would render it necessary to increase bus fares on a recipient's fixed-route bus systems by an (optional) percentage; (2) when the expense of operating a supplemental paratransit system would render it necessary to eliminate bus routes that serve an (optional) percentage of current ridership on the fixed-route bus systems; (3) when the expense of operating a supplemental paratransit system would increase the average current financial loss per trip of providing fixed-route and supplemental paratransit services to all riders by an (optional) percentage; or (4) if (optional) combinations of the above alternatives were met.[78]

Section 27.91 of the proposed regulations[79] required that accessible equipment be maintained in proper operating condition; that spare accessible equipment be available; that personnel be trained (and supervised) to operate accessible equipment properly and safely and to treat disabled people courteously and respectfully; that adequate assistance and information concerning the use of accessible transportation be made available to individuals with handicaps—including individuals with vision or hearing impairments; and that service be provided to disabled persons in a timely manner.[80]

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[74] Proposed regulation 49 C.F.R. §27.87(b).

[75] 55 *Fed. Reg.* at 11,124 (1990) (to be codified at 49 C.F.R. §28.87(b)(5)).

[76] Proposed regulation 49 C.F.R. §27.89.

[77] 55 *Fed. Reg.* at 11,125 (1990) (to be codified at 49 C.F.R. §27.89).

[78] 55 *Fed. Reg.* at 11,125 (1990) (to be codified at 49 C.F.R. §27.89(b)).

[79] Proposed regulation 49 C.F.R. §27.91.

[80] 55 *Fed. Reg.* at 11,125 (1990) (to be codified at 49 C.F.R. §27.91).

The DOT's 1990 proposed regulations were intended to "articulate its support of policies that would substantially improve access to mass transit services for handicapped persons."[81] In issuing the proposed regulations DOT stated:

> The Department is firmly committed to these policies [expanding services for disabled persons], both as they are expressed in pending legislation [*i.e.*, The Americans with Disabilities Act] and as appropriate responses to [S]ection 504 and [S]ection 16 [of the UMTA]. Consequently, the Department is proposing to replace the existing mass transit regulation with one that adopts these policies. Because of the Department's commitment to these policies, and because we believe that existing legal authority is sufficient to support a regulation putting them into practice, it is the Department's intention to proceed with amended regulations (subject, of course, to public comment) even in the absence of new legislation.[82]

After receiving public comment on the proposed regulations, the DOT will promulgate final regulations As this book went to press, full final regulations had not been issued.

C. Reasonable Accommodations Under Section 504

Disabled people have made very little headway in obtaining significant access to public ground transportation services via Section 504. Courts considering access-to-transportation cases under Section 504 have generally held that the accommodations requested by disabled plaintiffs did not satisfy the litmus test of "reasonableness." For example, in *Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority*[83] an association of handicapped people sought to enjoin the Rhode Island Public Transit Authority's proposed purchase of buses not equipped with wheelchair lifts. The Transit Authority owned 267 buses, of which 53 were equipped with wheelchair lifts. It planned to purchase 42 new buses without such lifts. The First Circuit interpreted the Supreme Court's ruling in *Southeastern Community College v. Davis*[84] to permit the Transit Authority to refuse to modify its program to equip 42 buses with wheelchair lifts at an estimated cost of $320,000, under the reasoning that the purchase did not fall within the narrow confines of the "unreasonable and discriminatory" action prohibited by Section 504.[85] Other courts have applied similar reasoning.[86]

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[81] 55 *Fed. Reg.* 11,120 (1990).

[82] *Id.*

[83] 718 F.2d 490 (1st Cir. 1983).

[84] 442 U.S. 397, 99 S. Ct. 2361 (1979). For discussion of *Davis*, *see* chapters 5 and 6 of this text, *supra*.

In *Dopico v. Goldschmidt*,[87] however, the Second Circuit offered some relief to the disabled plaintiffs. The plaintiffs in *Dopico* claimed that various New York City transit authorities violated their obligations to make special efforts to accommodate disabled people by failing to implement any of the transit authorities' proposed programs for accessible buses or paratransit services. The district court had dismissed the plaintiff's Section 504 claim on the ground that:

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[85] Strangely, in the *Rhode Island* case the First Circuit held that since "wheelchair users cannot board and ride buses unless the buses are specifically outfitted with lifts and wheelchair bays . . . in this limited but important sense the plaintiff class [of wheelchair users] is not 'qualified' to use buses of the ordinary sort." 718 F.2d at 496. Under this reasoning Section 504 is rendered a nullity, since a handicapped person would not be "otherwise qualified" and thus entitled to Section 504 protection unless his handicap does not hamper his ability to perform in a job or program in any way. For a discussion of the otherwise qualified issue under Section 504, *see* chapter 5 of this text, *supra*.

[86] See, e.g., Lloyd v. Illinois Regional Transportation Authority, 548 F. Supp. 575, 584-85 (N.D. Ill. 1982) (noting that the Supreme Court held in *Davis* that "burdensome modifications" are not required under Section 504, and holding that a request that transit authorities make " '*all* buses, rapid transit facilities, and fixed facilities purchased, modified or constructed since May 1, 1976 accessible to the handicapped' " exceeded the scope of Section 504) (emphasis in original); *Michigan Paralyzed Veterans v. Coleman*, 545 F. Supp. 245, 249-50 (E.D. Mich. 1982) (stating that Section 504 does "not require the Defendants to take affirmative steps to provide accessible public transportation for all handicapped and elderly persons. . . ," and following *Davis* in holding that "[i]nstead, Section 504 only requires administrators of federally funded programs or activities . . . to refrain from discriminating against the handicapped, as opposed to affirmatively acting on their behalf"); *Disabled in Action of Baltimore v. Bridwell*, 593 F. Supp. 1241, 1250-52 (D. Md. 1984) (following *Davis* in holding that Section 504 does not require that handicapped people be provided full accessibility to mass transportation facilities used by the general public), *appeal dismissed*, 820 F.2d 1219 (4th Cir. 1987).

See also, *Atlantis Community, Inc. v. Adams*, 453 F. Supp. 825 (D. Colo. 1978). When holding that Section 504 and the UMTA "do not provide a sufficient definition of the duties of . . . [transit authorities] to enable this court to give direction to" such authorities, the court stated as follows:

> How plain is the language of §16(a) of the UMT Act and 504 of the Rehabilitation Act? What must be done to provide handicapped persons with the same right to utilize mass transportation facilities as other persons? Does each bus have to have special capacity? Must each seat on each bus be removable? Must the bus routes be changed to provide stops at all hospitals, therapy centers and nursing homes? Is it required that buses be able to accommodate bedridden persons? Is it discriminatory to answer any of these questions in the negative? Will the operation of hydraulic lifts on buses involve stigmatizing effects on the persons who use them? If so, is that a discrimination solely by reason of handicap within the meaning of 504?
>
> These few questions illustrate the enormous difficulties which would be encountered by any attempt to establish the required affirmative program through the judicial process. Those difficulties would be compounded by the fact that these are national laws and national programs. Conflicting or even different interpretations in different courts within the federal judicial structure would result in a paralysis in the DOT and HEW until the matter finally reached the Supreme Court. The delay attendant upon that process may not only disadvantage the handicapped, it could halt or hinder the country's entire mass transportation system.

453 F. Supp. at 831.

[87] 687 F.2d 644 (2d Cir. 1982).

> Plaintiffs, if they were to prevail, would compel the [transit authorities] to expend huge resources over the next several decades which would fundamentally alter many transportation services. There is no escaping the fact that plaintiffs in this lawsuit seek a major overhauling of the transit system in their purpose to compel implementation of programs for the handicapped.[88]

The district court held that the remedy sought by the plaintiffs would require "massive expenditures" not required under Section 504. The Second Circuit reversed the district court's grant of summary judgment in favor of the defendants. First, the Second Circuit noted that even if the relief requested by the plaintiffs exceeded the scope of Section 504, the district court had "inherent power to fashion relief appropriate to the situation."[89] The Second Circuit distinguished the ruling in *Southeastern Community College v. Davis* by explaining that:

> In *Davis* nothing short of fundamental modifications in a professional training curriculum would accomplish the only relief that the plaintiff sought—admission to the nursing program. Here, by contrast, a whole range of prospective relief is imaginable to meet at least some of the plaintiffs' concerns, should they be able to prove their allegations. If ordering relief based on the . . . [Section 504] regulations would exceed the mandate of Section 504, then more modest relief must be fashioned within the limits of *Davis*.[90]

With respect to the issue of reasonable accommodations, the Second Circuit opined in *Dopico* that the plaintiffs were not seeking fundamental changes in the nature of the transit authorities' programs. The circuit court stated:

> The existing barriers to the "participation" of the wheelchair-bound are incidental to the design of facilities and the allocation of services, rather than being integral to the nature of public transportation itself, just as a flight of stairs is incidental to a law school's construction but has no bearing on the ability of an otherwise qualified handicapped student to study law.[91]

The Second Circuit recognized that if Section 504 is to have any meaning at all where transportation barriers are at issue, "some sort of action must be taken to remove" those barriers.[92] Thus, the court noted the inappropriateness of literally transferring the *Davis* rule to transportation cases. As the court explained, " '[i]t is not enough to open the door for the handicapped. . .; a ramp must be built so the door can be reached.' "[93]

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[88] 518 F. Supp. 1161, 1176 (S.D.N.Y. 1981), cited at 687 F.2d at 650.

[89] 687 F.2d at 650.

[90] *Id.*

[91] 687 F.2d at 653.

[92] 687 F.2d at 652.

D. Summary

Despite the promulgation of several federal statutes and numerous sets of regulations, as of early 1990 disabled persons had very little access to public ground transportation. The DOT regulations in effect in early 1990, promulgated under the federal statutes, provided for very limited accommodations to be made for disabled people. Moreover, even those minimal requirements were not being enforced. By way of example, the regulations gave rail transit companies ten years to make all of their facilities and stations accessible to disabled people— from 1979 until 1989.[94] In 1990, however, none of the rail systems to which the DOT regulations apply[95] had complied with this regulation; rather, only a small percentage (approximately 20 percent) of those rail stations were accessible.[96] Yet, the Federal Railroad Administration (the enforcing agency) had taken no enforcement action against any recipient of federal financial assistance as a penalty for failure to abide by the regulations.[97] Moreover, as of 1989 only about one-third of all buses were accessible to disabled people.[98] And, while the DOT issued proposed regulations in 1986 relating to the provision of accessible services by commuter rail companies,[99] no final regulations were ever promulgated on this subject.

The 1990 DOT regulations should greatly alleviate the ground transportation obstacles faced by disabled Americans. Moreover, it is hoped that the passage of the Americans with Disabilities Act[100] will further alleviate those obstacles. Since transit companies have several years to comply with the transportation provisions of the ADA, however, the practical effects of the ADA—at least with respect to transportation—will remain unknown for some time.

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[93] *Id.* (citing the Appellants' Brief at 20-21).

[94] 49 C.F.R. §27.73 (1989). *See* note 29 of this chapter, *supra.*

[95] Interestingly, the current DOT regulations only apply to railroad companies that receive federal financial assistance from the Federal Railroad Administration. *See* 49 C.F.R. §27.73 (1989).

[96] Telephone conversation of February 28, 1990 between Bonnie P. Tucker and John Cikota, Chief, Passenger Service Division, Federal Railroad Administration (approximately 20 percent of AMTRAK's stations were accessible as of February 1990).

[97] *Id.*

[98] In 1989 the American Public Transit Authority conducted a survey of its approximately 375 member transit companies. Three hundred and two transit companies responded to the survey. Those 302 transit companies possess 52,888 buses (42,803 of which are used for fixed-route services and the remainder of which are used for "special services," primarily demand-responsive systems). Of those 52,888 buses, 19,087 (36 percent), are equipped with lifts or ramps for wheelchair access. [1989 Transit Passenger Vehicle Fleet Inventory, American Public Transit Authority, A-2.]

[99] 51 *Fed. Reg.* 19032 (1986).

[100] *See* chapter 12 of this text, *infra.*

II. Airline Transportation

A. Section 504 of the Rehabilitation Act

Prior to the Supreme Court's decision in *United States Department of Transportation v. Paralyzed Veterans of America*,[101] a few courts considered whether airlines had discriminated against handicapped persons in violation of Section 504. By way of example, in *Jacobson v. Delta Airlines, Inc.*,[102] an individual with cerebral palsy challenged Delta's policy of requiring handicapped passengers to sign a medical release form agreeing that they may be removed from a flight at any point for either of two reasons: (1) when necessary for the safety and comfort of other passengers, or (2) when the handicapped passenger would be unable to take care of his or her needs during the flight. Although the airline would be obligated to remove *any* passenger who could not take care of his or her own needs during a flight, and although the airline would be obligated to remove any passenger when necessary for the safety and comfort of other passengers, only handicapped passengers had to sign such a form. The Ninth Circuit held that Delta's policy discriminated against handicapped passengers in violation of Section 504. Conversely, in *Anderson v. USAir, Inc.*[103] the court held that a USAir rule that excluded blind people from sitting in emergency row seats in airplanes did not violate Section 504.

The courts in *Jacobson* and *Anderson* viewed commercial airlines as recipients of federal financial assistance and as thus obligated to comply with Section 504. Subsequently, however, in 1986 the Supreme Court ruled in *United States Department of Transportation v. Paralyzed Veterans of America*[104] that commercial airlines are *not* recipients of federal financial assistance and thus are *not* obligated to comply with Section 504.[105] As a result of this decision, disabled airline passengers may not assert discrimination claims against airlines under Section 504.

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[101] 477 U.S. 597, 106 S. Ct. 2705 (1986).

[102] 742 F.2d 1202 (9th Cir. 1984), *cert. dismissed*, 471 U.S. 1062 (1985).

[103] 619 F. Supp. 1191 (D.D.C. 1985), *aff'd on other grounds*, 818 F.2d 49 (D.C. Cir. 1987).

[104] 477 U.S. 597, 106 S. Ct. 2705 (1986).

[105] For a discussion of this issue, *see* chapter 3 of this text, *supra*.

B. The Air Carrier Access Act of 1986

1. Procedural and Substantive Issues

In response to the Supreme Court's ruling in *Paralyzed Veterans*, Congress enacted the Air Carrier Access Act of 1986 (ACAA),[106] which amends Section 404 of the Federal Aviation Act (FAA)[107] to provide as follows:

> (c) *Discrimination against qualified handicapped individuals prohibited*
>
> (1) No air carrier may discriminate against any otherwise qualified handicapped individual, by reason of such handicap, in the provision of air transportation.
>
> (2) For the purposes of paragraph (1) of this subsection the term "handicapped individual" means any individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.[108]

Prior to the enactment of the ACAA, Section 404(a) of the FAA simply provided that air carriers must provide "safe and adequate service, equipment, and facilities" in connection with the provision of air transportation.[109] The District of Columbia Circuit held in *Anderson v. USAir*, Inc.[110] that Section 404(a) of the FAA does not provide a private right of action. Similarly, in *Dykens v. Eastern Airlines*[111] the court held that an airline passenger who was refused permission to fly on Eastern Airlines "without an attendant because he was physically disabled and non-ambulatory,"[112] did not have a private cause of action under Section 404(a) of the FAA.[113] Subsequently, however, in *Tallarico v. Trans World Airlines*,

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[106] 49 U.S.C.A. §1374(c) (West Supp. 1990).

[107] 49 U.S.C.A. §1374 (1976 and West Supp. 1990).

[108] 49 U.S.C.A. §1374(c) (West Supp. 1990).

[109] 49 U.S.C.A. §1374(a) (1976 and West Supp. 1990).

[110] 818 F.2d 49, 54 (D.C. Cir. 1987).

[111] No. CV 86-2553-WMB, slip op. (C.D. Cal. March 25, 1987), *aff'd without opinion*, 865 F.2d 1271 (9th Cir.), *cert. denied*, 110 S. Ct. 69 (1989).

[112] *Id.*, slip op. at 3.

[113] The court stated that "[p]laintiff does not have a private cause of action under the Federal Aviation Act, 49 U.S.C. §1374(a)." Slip op. at 6. Thus, the Section 404 provision to which the court referred appeared to be the "safe and adequate services" provision of paragraph (a).

In *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408 (9th Cir. 1984), however, the Ninth Circuit held that a blind air carrier passenger had a private right of action under Section 404(b) of the Federal Aviation Act, 49 U.S.C. §1374(b), which provided that:

Inc. (TWA)[114] the Eighth Circuit held that, when amending Section 404 of the FAA by adding the ACAA, Congress intended to create a private cause of action for disabled persons seeking a remedy for an airline's violation of the Act. In holding that a private right of action is available under the ACAA, the Eighth Circuit applied the test set forth by the Supreme Court in *Cort v. Ash.*[115] Under that test, four factors are relevant in determining the existence of an implied right of action: (1) whether the plaintiff is a member of the class for whose special benefit the statute was enacted; (2) whether there is evidence of legislative intent to create or deny such a remedy; (3) whether a private right of action is consistent with the underlying purposes of the legislative scheme; and (4) whether the cause of action is traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based on federal law. The Eighth Circuit agreed with the district court that each of these factors weighed in favor of implying a private right of action under the ACAA. The circuit court agreed that (1) Polly, a handicapped individual, was among the special class of persons for whose special benefit the ACAA was enacted; (2) circumstances surrounding enactment of the ACAA evidenced that Congress intended to create a private right of action under the ACAA to allow handicapped persons to seek redress for injuries incurred as a result of discriminatory conduct by air carriers; (3) a private right of action is consistent with the underlying scheme of the ACAA; and (4) discrimination against handicapped people by air carriers is not an area of law traditionally relegated to the states. If the *Tallarico* reasoning is followed by other courts, the ACAA should prove an effective remedy for disabled persons who suffer discrimination by airline companies on the basis of handicap.

In *Tallarico* the Eighth Circuit also discussed two substantive issues under the ACAA: the definition of an "otherwise qualified" handicapped individual under the Act and the scope of damages that may be awarded under that Act. Because *Tallarico* is the first case to consider these issues, the court's decisions on these points may set significant precedent. A brief review of the facts will put this case in the proper perspective:

Polly Tallarico has cerebral palsy, uses a wheelchair, and requires assistance in boarding and leaving airplanes. Her parents made a reservation for Polly to fly on TWA from Houston, Texas to St. Louis, Missouri for the 1986 Thanksgiving

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> No air carrier . . . shall . . . subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

As part of the Airline Deregulation Act of 1978, however [*see* 49 U.S.C.A. §1551(a)(2)(B) (West Supp. 1990)], Section 404(b) of the FAA ceased to be in effect on January 1, 1983. When the *Hingson* case arose, however, Section 404(b) was still in effect.

[114] 881 F.2d 566 (8th Cir. 1989).

[115] 422 U.S. 66, 95 S. Ct. 2080 (1975).

holiday. They informed the TWA reservations office that Polly would require a wheelchair and assistance. TWA refused to board Polly because of her handicap. Thus, Mr. Tallarico was forced to fly to Texas and accompany his daughter on the flight to Missouri. Subsequently, Mr. Tallarico was required to accompany his daughter on a flight back to Texas and then fly back to St. Louis alone. The Tallaricos claimed that TWA improperly discriminated against Polly.

a. Otherwise qualified handicapped person

TWA contended that Polly was not an "otherwise qualified handicapped individual" within the meaning of the ACAA. The Eighth Circuit disagreed. The circuit court held that the legislative history of the Act states that the definition of that term is intended to be consistent with the definition of the term "qualified handicapped person" set forth in the Civil Aeronautics Board (CAB) Section 504 regulations relating to airlines.[116] The CAB Section 504 regulations define a "qualified handicapped person" as a handicapped individual:

> (1) Who tenders payment for air transportation;
>
> (2) Whose carriage will not violate the requirements of the Federal Aviation Requirements . . . or, in the reasonable expectation of carrier personnel. . . , jeopardize the safe completion of the flight or the health or safety of other persons; and
>
> (3) Who is willing and able to comply with reasonable requests of airline personnel or, if not, is accompanied by a responsible adult passenger who can insure that the requests are complied with. . . .[117]

During trial to a jury, the district court instructed the jury that it was required to find that Polly was an otherwise qualified handicapped individual before it could award Polly damages against TWA. The jury determined that Polly satisfied that definition, but the district court stated that had it been the trier of fact it would have reached a different conclusion. In agreeing with the jury's conclusion, the Eighth Circuit stated:

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[116] 14 C.F.R. Part 382 (1990). *See* 14 C.F.R. §382.3(c) (1990). The court analogized to the CAB Section 504 regulations because the DOT had not yet promulgated regulations under the ACAA. Under the DOT's 1990 regulations, however, a qualified handicapped individual is one who purchases or possesses a valid ticket and meets reasonable, nondiscriminatory contract of carriage requirements. *See* note 132 of this chapter and corresponding text, *infra*.

Despite the ruling in *Paralyzed Veterans*, the DOT has held that an airline violated the CAB regulations (14 C.F.R. Part 382) by requiring all passengers who are totally blind and deaf to travel with a ticketed companion. In *Southwest Airlines Co., Enforcement Proceeding*, Docket 42425, DOT Office of the Secretary, November 6, 1987, the DOT stated:

> Southwest's requirement that *all* deaf-blind passengers must travel with a companion is overbroad, because it unjustly discriminates against those deaf-blind individuals who can demonstrate an ability to understand general safety instructions. We consider that many deaf-blind individuals who can communicate effectively on these matters with Southwest personnel in advance of the flight could meet such a test. . . .

Id. at 2 (emphasis in original). Thus, DOT held that Southwest's rule violated both Section 404(a) of the ACAA and 14 C.F.R. §§382.4 and .5 (1987).

[117] *Id.*

> The evidence at trial showed that Polly had tendered payment for air transportation, that her carriage would not violate any FAA regulations (in fact she had flown alone before), and that she was capable of complying with the reasonable safety requests of airline personnel. The evidence demonstrated that Polly is able to crawl on her knees or her hands and knees, that she has normal intelligence, and that she is capable of communicating her needs [via use of communication boards, an electronic memo writer and a portable computer with electronic voice]. . . . Polly is able to fasten her own seatbelt as well as put on an oxygen mask.[118]

b. Damages

At trial the jury awarded $80,000 in damages to the Tallaricos. The district court determined that $1,350 of the award constituted out-of-pocket damages,[119] and the remainder constituted damages for emotional distress. That court held that because the ACAA is an antidiscrimination statute, it does not permit damages for emotional distress.[120] Thus the district court granted judgment notwithstanding the (jury's) verdict (judgment n.o.v.) in favor of TWA as to $78,650 of the damage award, and awarded the Tallaricos only the $1,350 out-of-pocket damages.

On appeal, however, the Eighth Circuit reversed. That court first held that the district court's assumption that "all antidiscrimination statutes disallow emotional distress damages is incorrect."[121] The Eighth Circuit noted that damages for mental and emotional distress are compensable under Sections 1983[122] and 1982,[123] as well as under the Fair Housing Act.[124] Holding that "the purpose and operation of the ACAA are more closely analogous to [S]ection 1983 . . ." than other antidiscrimination statutes, the Eighth Circuit concluded that "emotional distress damages are allowable under the ACAA."[125] Finding the evidence sufficient to show that Polly Tallarico suffered severe emotional distress as a result of TWA's actions, the Eighth Circuit reversed the district court's judgment n.o.v. and reinstated the $80,000 damage award entered by the jury.[126]

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[118] 881 F.2d at 569.

[119] Presumably these damages include the costs incurred by Mr. Tallarico in flying back and forth from Houston to St. Louis.

[120] 693 F. Supp. 785, 790-91 (E.D. Mo. 1988).

[121] 881 F.2d at 570.

[122] 42 U.S.C.A. §1983 (1981). For a description of Section 1983 *see* note 63 of chapter 8 of this text, *supra*.

[123] 42 U.S.C.A. §1982 (1981) (providing that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property").

[124] 42 U.S.C.A. §§3601-3631 (1977 and West Supp. 1990). For a discussion of the Fair Housing Act, *see* chapter 11 of this text, *infra*.

Subsequently, in *Shinault v. American Airlines, Inc.*,[127] the district court disagreed with the Eighth Circuit's reasoning that emotional distress damages are available under the ACAA. That court reasoned that since the ACAA was promulgated in response to the Supreme Court's ruling in *Paralyzed Veterans* that Section 504 does not apply to private air carriers, it is "difficult to imagine that Congress intended to provide remedies of a different nature under the ACAA than are recoverable under [S]ection 504. . . ."[128] The district court then held that in the Fifth Circuit "emotional distress damages are not recoverable under [S]ection 504."[129] To date, therefore, a split of authority exists with respect to the scope of damages available under the ACAA.[130]

2. Regulations

Although the ACAA was enacted in 1986, as of early 1990 the DOT had not enacted any regulations to effectuate that Act. Consequently, in *Paralyzed Veterans of America v. Skinner*[131] an organization of veterans with disabilities and three individuals who use wheelchairs filed an action seeking to compel the Secretary of DOT to issue regulations to enforce the ACAA. On January 25, 1990 the parties entered into a stipulation that the final regulation enforcing the ACAA should be submitted to the *Federal Register* for publication on or before March 30, 1990.[132] Those regulations were published in the *Federal Register* on March 6, 1990.[133] The most significant provisions of the regulations are summarized as follows:

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[125] 881 F.2d at 571.

[126] In addition to requesting damages for emotional distress, the Tallaricos requested an award of punitive damages. The punitive damages issue was not submitted to the jury. Rather, at the close of the Tallaricos' evidence the district court granted TWA's motion for a directed verdict on the question of punitive damages. On appeal the Eighth Circuit did not reach the question of whether punitive damages are available under the ACAA, because the circuit court agreed that the evidence did not support an award of punitive damages.

[127] No. Civ. Act. J89-0254(B), slip op. (S.D. Miss. May 25, 1990) (available on Lexis genfed library).

[128] Slip op. at 9.

[129] Slip op. at 11. In so ruling, the court followed *Rhodes v. Charter Hospital*, 730 F. Supp. 1383 (S.D. Miss. 1989), and *Bradford v. Iron County C-II School District*, 36 Fair Empl. Prac. Cas. (BNA) 1296 (E.D. Mo. 1984). For a discussion of the *Rhodes* and *Bradford* cases, *see* section II(B) of chapter 8 of this text, *supra*.

[130] Indeed, the court in *Shinault*, while not expressly ruling on the issue, indicated that damages would only be available under Section 504—and thus the ACAA—if it were shown that the defendant *intentionally* discriminated against the plaintiff. *See* slip op. at 9-10. The *Shinault* case is currently on appeal to the Fifth Circuit.

[131] No. Civ. Act. 89-1709(NHJ), slip op. (D.D.C. January 25, 1990).

(a) The definition of a "handicapped individual" is the same as that under Section 504.[134]

(b) A "qualified handicapped individual" with respect to obtaining air transportation is one who (i) purchases or possesses a valid ticket; and (ii) meets "reasonable, nondiscriminatory contract of carriage requirements available to all passengers."[135]

(c) In general, air carriers are prohibited from: (i) discriminating against "an otherwise qualified handicapped individual, by reason of such handicap, in the provision of air transportation"; (ii) requiring a handicapped person "to accept special services (including, but not limited to, preboarding) not requested by the passenger"; (iii) excluding a qualified handicapped person from, or denying such person the benefit of, air transportation or related services that are available to non-handicapped persons "even if there are separate or different services available for handicapped persons except when specifically permitted [by the regulations]"; and (iv) taking adverse action against an individual because of the individual's assertion of rights protected by the ACAA.[136]

(d) Contracts between air carriers and service providers (including travel agents) must include a "[n]ondiscrimination on the basis of handicap" clause.[137]

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[132] Slip op. at 1.

Plaintiffs also requested that the court order the DOT to promulgate regulations under Section 504 with respect to all programs conducted by the DOT. Although Congress mandated in 1978 when amending Section 504 to cover federally conducted programs that all agencies issue such regulations, as of 1990, 11 years after issuance of that mandate, no such regulations have been promulgated. The stipulation between the parties provided that the notice of proposed rulemaking enforcing Section 504 with respect to programs and activities conducted by the DOT would be submitted on or before February 5, 1990 to the *Federal Register*, with a comment period of 60 days [slip op. at 1]. Within 30 days after the close of the 60-day comment period, the DOT was required to submit a report to the court "setting forth a proposed timetable for completion of the drafting of the final regulation, so that a mutually agreeable timetable may be determined for the [DOT] to analyze and to review the comments, draft the final regulation, and submit the final regulation [for approval and clearance]" [*id.* at 2]. If the parties were unable to agree on a timetable, the court would establish such a timetable [*id.*]. The DOT published its notice of proposed rule making on February 9, 1990. *See* 55 *Fed. Reg.* 4633 (1990).

[133] 55 *Fed. Reg.* 8008, 8046-54 (1990) (to be codified at 14 C.F.R. §§382.1-382.65) (proposed March 6, 1990).

[134] 55 *Fed. Reg.* 8047 (1990) (to be codified at 14 C.F.R. §382.5). For a discussion of the definition of the term "handicapped individual" under Section 504, *see* chapter 4 of this text, *supra*.

[135] *Id.*

[136] 55 *Fed. Reg.* at 8047-48 (1990) (to be codified at 14 C.F.R. §382.7(a)).

[137] 55 *Fed. Reg.* at 8048 (1990) (to be codified at 14 C.F.R. §382.9).

(e) Newly purchased aircraft must meet the following accessibility standards: (i) Aircraft having 30 or more passenger seats "shall have movable aisle armrests on at least one-half of the passenger aisle seats."[138] Arrangements are to be made to allow individuals with mobility impairment to "readily obtain seating in rows with movable aisle armrests."[139] (ii) Aircraft with 100 or more passenger seats must have space in the cabin to store at least one folding wheelchair.[140] (iii) Aircraft with more than one aisle in which lavatories are provided must contain at least one accessible lavatory.[141] Air carriers are not required to retrofit existing aircraft, but as existing planes are refurbished accessibility features would be required to be added.[142]

The DOT concluded that Section 504 standards are to apply to implementation of the ACAA.[143] The DOT stated:

> Floor comments about "equal access" and "second class citizenship" do not evince an intent by Congress to create a new, separate standard for accessibility, beyond that of [S]ection 504. The language of [the ACAA] is essentially similar to that of Section 504, and, even considered in light of the legislative history, does not give rise to an inference that a stricter-than 504 standard is established by the statute.[144]

Thus, the DOT concluded that the ACAA regulations "may not impose 'undue financial or administrative burdens' . . . or require fundamental changes in the carrier's programs. . . ."[145] The above cited provisions are held by the DOT to codify the requisite "reasonable accommodations" that air carriers must provide for disabled passengers.

(f) Airport facilities (terminal facilities, including parking and ground transportation facilities) must "when viewed as a whole, be accessible to and usable by handicapped individuals."[146] All facilities designed, constructed or altered[147] after April 5, 1990 (the effective date of the 1990 regulations)[148] must be accessible to handicapped persons.[149] Existing facilities must be made accessible as soon as possible but no later than three years from that same date.[150]

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[138] 55 *Fed. Reg.* at 8048 (1990) (to be codified at 14 C.F.R. §382.21(a)(1)(i)).

[139] 55 *Fed. Reg.* at 8048 (1990) (to be codified at 14 C.F.R. §382.21(a)(1)(iii)).

[140] 55 *Fed. Reg.* at 8048 (1990) (to be codified at 14 C.F.R. §283.21(a)(2)).

[141] 55 *Fed. Reg.* at 8048 (1990) (to be codified at 14 C.F.R. §382.21(a)(3)). Other aircraft are not required to have accessible lavatories, but those aircraft with more than 60 passenger seats that do have an accessible lavatory must have an operable on-board wheelchair for the use of passengers. 55 *Fed. Reg.* at 8048 (1990) (to be codified at 14 C.F.R. §382.21(a)(4)). The DOT stated that it was "deferring a decision, at this time, concerning accessible lavatories in narrowbody and smaller aircraft." 55 *Fed. Reg.* at 8021 (1990).

[142] 55 *Fed. Reg.* at 8023 (1990).

[143] 55 *Fed. Reg.* at 8011 (1990).

[144] *Id.*

[145] *Id.*

(g) Air carriers are prohibited from refusing to provide transportation to a qualified handicapped individual on the basis of his or her handicap,[151] or because "the person's handicap results in appearance or involuntary behavior that may offend, annoy, or inconvenience crewmembers or other passengers."[152] Carriers may not limit the number of handicapped persons who may travel on a given flight.[153]

(h) Air carriers *may* refuse to provide transportation to any passenger "on the basis of safety," or to any passenger whose carriage would violate FAA regulations.[154] When exercising this authority, however, "carrier personnel shall not discriminate against any qualified handicapped individual on the basis of handicap," and the actions of carrier personnel may not be inconsistent with the ACAA regulations.[155] A carrier that refuses to provide transportation to any individual on the basis of handicap must set forth the reasons for that decision in writing within ten days.[156]

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[146] 55 *Fed. Reg.* at 8048-49 (1990) (to be codified at 14 C.F.R. §382.23(a)). This section is to operate in tandem with the Section 504 regulations, 49 C.F.R. §27.71, referred to in note 28 of this chapter, *supra*. *See* 55 *Fed. Reg.* at 8023 (1990). The regulations under the two sections are similar. The Section 504 regulations apply to airport facilities owned, leased, operated or controlled by recipients of federal financial assistance. The ACAA regulations apply to facilities owned, leased, operated or controlled by aircraft carriers (who are not recipients of federal financial assistance). *See* 55 *Fed. Reg.* at 8024 (1990). Thus, "at an airport not receiving Federal financial assistance, facilities that are not owned, leased, operated or controlled by an air carrier would not be subject to accessibility requirements under either [S]ection 504 or the ACAA." *Id.*

[147] The term "altered" as used in the ACAA regulations is intended to be defined in the same manner as that term is described under the Architectural Barriers Act (ABA), 42 U.S.C.A. §§4151-4157 (1981 and West Supp. 1990). 55 *Fed. Reg.* at 8025 (1990). For a discussion of the ABA *see* chapter 11 of this text, *infra*.

[148] *See* 55 *Fed. Reg.* at 8008 (1990).

[149] 55 *Fed. Reg.* at 8048 (1990) (to be codified at 14 C.F.R. §382.23(c)). This section requires accessibility with respect to terminal flow, ticketing systems, baggage facilities and facilities for moving between the gate area and aircraft. *Id.* In addition, every terminal must include at least one telecommunication device for the deaf (TDD), and, to further assist hearing-impaired passengers, the "primary information mode" with respect to terminal information systems shall be visual words, letters or symbols. To assist blind persons, terminals must also have facilities for providing information orally. *Id.*

[150] 55 *Fed. Reg.* at 8048 (1990) (to be codified at 14 C.F.R. §382.23(d)).

[151] 55 *Fed. Reg.* at 8049 (1990) (to be codified at 14 C.F.R. §382.31(a)).

[152] 55 *Fed. Reg.* at 8049 (1990) (to be codified at 14 C.F.R. §382.31(b)). This provision is especially important to persons with some forms of nervous or muscular disorders, to some persons with cerebral palsy and similar disabilities, and to persons with Tourette's Syndrome.

[153] 55 *Fed. Reg.* at 8049 (1990) (to be codified at 14 C.F.R. §382.31(c)).

[154] 55 *Fed. Reg.* at 8049 (1990) (to be codified at 14 C.F.R. §382.31(d)). Under this regulation, carriers retain "decisional discretion" to exclude disabled individuals from a flight due to safety reasons. 55 *Fed. Reg.* at 8026 (1990).

(i) Air carriers *may* require up to 48 hours advance notice and one hour advance check-in for a passenger who wishes to receive: (a) medical oxygen for use on board the flight; (b) carriage of an incubator; (c) hook-up of a respirator; (d) accommodation of a passenger on a stretcher; (e) transportation of an electric wheelchair when the aircraft has fewer than 60 seats; (f) provision of hazardous materials packaging for a battery for a wheelchair or other assistive device; (g) accommodation for a group of ten or more handicapped individuals traveling together; (h) provision of an on-board wheelchair on an aircraft that does not have an accessible lavatory.[157] Air carriers may *not* request advance reservations in any other circumstance.[158]

(j) Air carriers may require that a handicapped passenger be accompanied by an attendant *only* when the passenger is (i) traveling on a stretcher or in an incubator; (ii) mentally disabled to such an extent that he or she is unable to comprehend or respond appropriately to safety instructions; (iii) so severely mobility-impaired that he or she is unable to assist in his or her own evacuation of the aircraft; or (iv) both severely vision impaired *and* severely hearing-impaired *and* cannot establish "*some* means of communication with carrier personnel."[159] If a carrier determines that a handicapped passenger must be accompanied by an attendant for one of the foregoing reasons, but the passenger disagrees, the carrier may not charge for the transportation of the attendant.[160]

(k) Air carriers may only restrict the seating of handicapped passengers to comply with the requirements of FAA exit-seating regulations, or (i) when necessary to mitigate safety concerns resulting from a passenger's handicap that causes involuntary active behavior or (ii) to accommodate a service animal (*e.g.*, seeing eye dog or hearing dog).[161]

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[155] *Id.*

[156] *Id.* The writing requirement is intended to prevent arbitrary decisions. The DOT stated:

> If there is a reasonable, specific, safety basis for an exclusion, then the carrier personnel who make the decision will be able to articulate it. If there is not such a basis for the decision, which the carrier can articulate, then it is a decision better left unmade.

55 *Fed. Reg.* at 8026 (1990).

[157] *Fed. Reg.* at 8049 (1990) (to be codified at 14 C.F.R. §382.33(b)).

[158] *Id.*

[159] 55 *Fed. Reg.* at 8049 (1990) (to be codified at 14 C.F.R. §382.35(a)(b))(emphasis added).

[160] 55 *Fed. Reg.* at 8050 (1990) (to be codified at 14 C.F.R. §382.35(c)).

[161] 55 *Fed. Reg.* at 8050 (1990) (to be codified at 14 C.F.R. §382.37 (a),(b),(c)).

The FAA published exit-seating regulations on the same date that the ACAA regulations were published.[162] The FAA's exit-row seating regulations provide that a person seated in a row next to an emergency door must be able to: (1) "locate the door and quickly follow the instructions, written and oral, for its use"; (2) "physically . . . open the door"; (3) "determine when to open the door"; (4) "go quickly through the open exit"; and (5) "devote full attention to his or her emergency task."[163] Thus, severely visually or hearing-impaired persons are precluded from sitting in exit rows, as are persons traveling with children, persons unable to read or understand English, persons under the age of 15, or persons who are unable to perform one or more of a specific list of physical tasks without assistance.[164] This regulation is strongly opposed by blind people, who believe that blind people are as capable as sighted people of opening emergency doors and following evacuation procedures when necessary.[165]

(l) Air carriers must accommodate hearing-impaired passengers by: (i) providing timely access to routine information such as information concerning ticketing, flight delays, schedule changes, connections, gate assignments and the like;[166] (ii) maintaining a TDD (telecommunication device for the deaf) reservation and information service;[167] and (iii) ensuring that video instructions are captioned or contain an inset for a sign-language interpreter.[168]

(m) Air carriers may not refuse to provide transportation to passengers with communicable diseases, require such passengers to provide medical certificates, or impose upon such passengers any conditions or restrictions not imposed on other passengers,[169] *unless* the communicable disease at issue has been determined by a qualified federal public health authority "to be transmissible to other persons in the normal course of a flight."[170]

(n) Air carriers must provide assistance to disabled persons in entering and leaving aircraft, in moving to and from seats, in preparing to eat meals (such as by opening packages or identifying food), in moving to and from the lavatory (when the passenger is semi-ambulatory or the plane contains an on-board wheelchair) and in loading and retrieving carry-on items.[171] Air carriers are *not* required to provide assistance with actual eating, to provide restroom assistance, or to provide medical services.[172]

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[162] 55 *Fed. Reg.* 8054, 8072-75 (1990) (to be codified at 14 C.F.R. §§121.585, 135.129) (proposed March 6, 1990).

[163] 55 *Fed. Reg.* at 8055 (1990).

[164] 55 *Fed. Reg.* at 8072-73 (1990) (to be codified at 14 C.F.R. §121.585).

[165] *E.g.*, 55 *Fed. Reg.* at 8032 (1990).

[166] 55 *Fed. Reg.* at 8051-52 (1990) (to be codified at 14 C.F.R. §382.45(c)).

[167] 55 *Fed. Reg.* at 8052 (1990) (to be codified at 14 C.F.R. §382.47(a)).

[168] 55 *Fed. Reg.* at 8052 (1990) (to be codified at 14 C.F.R. §382.47(b)).

[169] 55 *Fed. Reg.* at 8052 (1990) (to be codified at 14 C.F.R. §382.51(a)).

[170] 55 *Fed. Reg.* at 8052 (1990) (to be codified at 14 C.F.R. §382.51(b)).

On April 4, 1990 Paralyzed Veterans of America's (PVA) Zia Chapter (a New Mexico chapter of the PVA) filed a petition for review of the ACAA regulations with the Tenth Circuit.[173] At that time PVA had two primary objections to the regulations.[174] First, PVA contended that the regulatory provision giving air carriers discretion to determine whether disabled persons must travel with attendants[175] is unduly patronizing. Second, PVA contended that the advance notice requirements with respect to electric wheelchairs and wheelchair batteries[176] conflict with the ACAA's purpose of providing nonrestrictive services to disabled persons except where safety is at issue; according to PVA the only reason for the advance notice requirements is to serve the airlines' convenience.[177] DOT invited public comment on the regulations for 30 days prior to June 5, 1990.[178]

Further, on April 3, 1990, at the request of air carriers, DOT extended to June 4, 1990, compliance with the regulatory provisions pertaining to training of airline personnel, changes in administrative procedures, and the acquisition of new equipment.[179] On June 11, 1990, DOT published a final rule establishing new compliance dates for all provisions of the ACAA regulations.[180] The DOT refused the request of the Air Transportation Association (ATA) to set a compliance date of October 5, 1990 for the entire regulations.[181] The DOT did, however, extend the compliance date to August 5, 1990 with respect to certain sections of the regulations, and to October 5, 1990 with respect to other portions of the regulations.[182]

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[171] 55 *Fed. Reg.* at 8050 (1990) (to be codified at 14 C.F.R. §382.39).

[172] *Id.*

[173] Telephone conversation of April 24, 1990 between Bonnie Tucker and Maureen McCloskey, Associate Director of Advocacy of the national PVA.

[174] *Id.*

[175] *See* the discussion of 14 C.F.R. §382.35 at notes 159 and 160 of this chapter and accompanying text, *supra.*

[176] *See* the discussion of 14 C.F.R. §382.33(b) at note 157 of this chapter and accompanying text, *supra.*

[177] Telephone conversation of April 24, 1990 between Bonnie Tucker and Maureen McCloskey, Associate Director of Advocacy of the national PVA.

[178] *Id.*

[179] *Id.*

[180] 55 *Fed. Reg.* 23539 (1990).

[181] 55 *Fed. Reg.* at 23540 (1990).

C. Common Law Duty of Carriage

In *Dykens v. Eastern Airlines, Inc.*[183] a wheelchair-bound individual with cerebral palsy had a reservation on an Eastern Airlines flight out of Los Angeles to Syracuse, New York. He made the reservation more than 24 hours prior to flight time and told the ticket agent he used a wheelchair and needed assistance getting on and off the plane. When Dykens got to the gate he was told he could not fly without an attendant because he was nonambulatory. After some changes of mind, he was ultimately refused to allow to board his flight. Eastern finally booked him on a flight that left the next day. As a result, Dykens missed one day of his vacation, he was without his belongings for one day since his luggage had gone on the first flight, he had to spend an extra day in Los Angeles and get transportation to and from the airport again (not a simple task for someone in a wheelchair), and he suffered temporary emotional upset. After holding that Dykens had no cause of action under either Section 504 or Section 404(a) of the ACAA,[184] the court held that Eastern breached its common law duty of carriage as a result of its violation of its own tariff.

As a certified air carrier, Eastern was required to file a tariff showing its rules, regulations, practices and services.[185] The tariff in effect at the time of the subject incident in *Dykens* provided that a passenger in a wheelchair would be allowed to board flights if the passenger was capable of caring for his or her own needs and made a reservation 24 hours in advance. The court held that, in failing to follow its own tariff and standard operating practice, Eastern had breached its common law duty of carriage.

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[182] *See generally*, 55 *Fed. Reg.* at 23541-44.

In *Shinault v American Airlines, Inc.*, No. Civ. Act. J89-0254, slip op. (S.D. Miss. May 25, 1990), the plaintiff sought entry of an order requiring American Airlines to *implement* the regulations promulgated under the ACAA. Specifically, plaintiff sought entry of an order requiring the airline to "implement rules, regulations and training procedures requiring officers, managers, agents and employers of American Airlines to properly comply with the ACAA as it relates to . . . disabled persons," and an order requiring American Airlines "to provide access to wheelchairs equipped with seat belts and other safety devices." [Slip op. at 13-14] The court refused to enter such an order based on the doctrine of primary jurisdiction. According to the court, the doctrine of primary jurisdiction "applies where the enforcement of a claim requires resolution of issues under a regulatory scheme and where Congress has placed the responsibility for developing that regulatory scheme within the competence of an administrative body." [Slip op. at 14] After reviewing the proposed rules promulgated by the Secretary of Transportation under the ACAA, and "observing that those proposed rules cover the matters which are the subject of plaintiff's complaint," the court held that it must refrain from entertaining the plaintiff's request for equitable orders because the Secretary of Transportation is charged with responsibility to resolve issues arising under the ACAA's regulatory scheme. [Slip op. at 15].

[183] No. CV86-2553-WMB, slip op. (C.D. Cal. March 25, 1987).

[184] *See* text at note 93 of this chapter, *supra*. The *Dykens* court did not address the private right of action issue under Section 404(b) of the ACAA. The court also denied Dykens's tort claims of intentional or negligent infliction of emotional distress because "his self-esteem was not damaged and the agitation did not have a lasting effect." Slip op. at 4.

[185] *Id.*, slip op. at 2.

Another instance in which an airline may be held to have breached its common law duty of carriage with respect to handicapped passengers involves the failure to care adequately for such passengers. In *Suarez v. Trans World Airlines, Inc.*,[186] for example, the Seventh Circuit stated:

> Under Illinois law, "when a common carrier knows that a passenger is affected by a physical or mental disability which increases the hazards of travel, a degree of attention should be bestowed on his safety beyond that due to an ordinary passenger in proportion to the liability to injury from the want of it."[187]

The Seventh Circuit held that failure to provide the requisite standard of care would violate an airline's common law duty of carriage.

While *Suarez* involved the application of state law (Illinois), it has been held that the Federal Aviation Act has effectively codified that principle.[188] Although actual codification of the principle is unclear, the Federal Aviation Administration has opined that

> [i]t is clear, therefore, that there is accord between the common law, state statutes, and the Federal Aviation Act regarding the duty of care required of common carriers. It is equally clear that this standard requires affirmative acts of common carriers to protect [their] passengers.[189]

In some instances, therefore, it may be argued that disabled people have a federal cause of action against an airline for the airline's breach of its common law duty of carriage. The DOT may take the position, however, that the ACAA preempts *any* common law action premised on discriminatory conduct by airlines. In the preamble of the 1990 regulations enacted pursuant to the ACAA, the DOT stated as follows:

> the Department anticipates one Federalism effect of the regulation. This regulation pertains to "services" provided to passengers by carriers, within the meaning of Section 105 of the Federal Aviation Act. It is also a comprehensive regulation in the area of the rights of handicapped passengers, promulgated pursuant to the ACAA (Section 404(c) of the Federal Aviation Act),

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[186] 498 F.2d 612 (7th Cir. 1974).

[187] 498 F.2d at 616.

[188] *See, e.g., Widmyer v. Southeast Skyways, Inc.*, 584 P.2d 1, 5 n.10 (Alaska 1978).

[189] Memorandum from the Federal Aviation Administration to the National Council for Independent Living, "Common Carriers — Duty of Care Under Common Law," 4-5 (October 14, 1987).

which appears to occupy the field. For these reasons, it is likely that this regulation will have the effect of preempting state regulation of the transportation of handicapped persons by regulated carriers in many instances. While the Department can consider, on a case-by-case basis, whether a particular state action would be preempted, it is likely that most state regulatory action in this area would be subject to preemption. The Department regards this effect as inevitable in view of the provisions of the Federal Aviation Act involved.[190]

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[190] 55 *Fed. Reg.* at 8046 (1990).

11

Architectural Barriers and Housing

I. Architectural Barriers

A. The Architectural Barriers Act

The Architectural Barriers Act (ABA)[1] is intended to assist in ensuring a barrier-free environment for disabled persons. Recognizing that voluntary action was insufficient, the National Commission on Architectural Barriers to the Rehabilitation of the Handicapped recommended to Congress that one federal agency be charged with responsibility to promulgate and enforce uniform policies, procedures and specifications to provide disabled people with access to government funded or supported buildings.[2]

As enacted in 1968, the ABA authorized three federal agencies to promulgate standards with regard to the design, construction and alteration of federally owned, leased, or financed buildings to allow ready access to and use by people with disabilities. The Department of Housing and Urban Development (HUD) was authorized to prescribe standards for residential structures;[3] the Department of Defense was authorized to prescribe standards for military structures;[4] and the

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[1] 42 U.S.C.A. §§4151-4157 (1977 and West Supp. 1990).

[2] National Commission on Architectural Barriers to Rehabilitation of the Handicapped, Design for All Americans, H.R. Doc. No. 324, 90th Cong., 2d Sess. 5 (1968).

[3] *See* 42 U.S.C.A. §4153 (1977 and West Supp. 1990).

[4] *See* 42 U.S.C.A. §4154 (1977 and West Supp. 1990).

General Services Administration (GSA) was authorized to prescribe standards for all other buildings covered under the Act.[5] The ABA was amended in 1976 to authorize the Postal Service to promulgate standards with respect to postal facilities.[6] As amended in 1976, the ABA *requires*, rather than simply authorizes, the four above-named federal agencies to promulgate the specified standards with respect to the buildings or facilities covered within their respective jurisdictions.[7]

The ABA applies to buildings or facilities that are intended to be used in a manner that will require that they be accessible to the public, or that may result in people with handicaps being employed or residing therein.[8] Covered buildings and facilities include those:

> (1) to be constructed or altered by or on behalf of the United States;
>
> (2) to be leased in whole or in part by the United States after August 12, 1968;
>
> (3) to be financed in whole or in part by a grant or a loan made by the United States after August 12, 1968, if such building or facility is subject to standards for design, construction, or alteration issued under authority of the law authorizing such grant or loan; or
>
> (4) to be constructed under authority of the National Capital Transportation Act of 1960, the National Capital Transportation Act of 1965, or title III of the Washington Metropolitan Area Transit Regulation Compact.[9]

The coverage of the ABA is obviously limited. With the exception of the Washington, D.C. subway system, a structure is covered under the Act only if it is one of three types of buildings: (1) structures that are constructed or altered by or on behalf of the federal government after the effective date of standards issued under the Act in 1969; (2) structures that were leased by the United States between 1968 and 1976 after being constructed in accord with federal plans and specifications, or any structure leased by the United States after January 1, 1977;[10] and (3) structures that receive a federal grant or loan for design, construction or alteration—such as college buildings or hospitals. The latter type of structure, however, only falls within the parameters of the ABA if the funding statute authorizes the imposition of standards for its *design, construction* or *alteration*. A building such as a hospital that receives federal funds will not be covered by the ABA unless such funds are specifically utilized for design, construction or alteration of that building. It has been noted that "[a]n important example of funds that do not meet these requirements are revenue-sharing funds that often go to state and local governments for construction of town halls, police stations, and other municipal buildings."[11]

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[5] *See* 42 U.S.C.A. §4152 (1977 and West Supp. 1990).

[6] *See* 42 U.S.C.A. §4154(a) (1977 and West Supp. 1990).

[7] 42 U.S.C.A. §§4152-4154a (1977 and West Supp. 1990).

[8] 42 U.S.C.A. §4151 (1977 and West Supp. 1990).

[9] *Id.* (footnote omitted). Covered buildings and facilities, however, do not include "a privately owned residential structure not leased by the Government for subsidized housing programs," or "any building or facility on a military installation designed and constructed primarily for use by able bodied military personnel." *Id.*

[10] In *Rose v. United States Postal Service*, 774 F.2d 1355 (9th Cir. 1984), the Ninth Circuit held that the ABA required the Postal Service to make *all* buildings it leased after January 1, 1977, the effective date of the 1976 amendments to the Act, accessible to handicapped people, regardless of whether such leased buildings otherwise required alteration. The Ninth Circuit explained that as originally enacted in 1968, the ABA defined a building within its coverage as any building or facility to be leased in whole or

Moreover, there are several anomalies in the ABA. The most significant one is that when alterations are made to a covered building the ABA requires only that the altered portion be made accessible; the unaltered portion of the building does not have to be made accessible. Thus, it has been noted that:

> [the ABA] does not require that if the bathroom is altered, a ramp must be put on the outside of the building. This anomaly in the Act can sometimes lead to strange situations. For instance, a building might have accessible bathrooms, phones, and water fountains, but there will be no outside ramp for a wheelchair to allow the person to enter the building in the first place.[12]

A second anomaly (or at least a glaring gap) under the ABA is that if a federal agency resides in a (non-leased) building constructed prior to 1968 that is not being altered, the building need not be made accessible to handicapped people.

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in part by the United States "after construction or alteration in accordance with plans and specifications of the United States." 774 F.2d at 1358. In 1976 Congress amended that section of the Act by deleting the quoted language, and by defining the term "buildings" to include those " 'to be leased in whole or in part by the United States after [January 1, 1977]'." 774 F.2d at 1357. The circuit court noted that "[a]lthough the date remains August 12, 1968 in the text of the statute, under Pub. L. No. 94-541, §§201-02, 90 Stat. 2507-08 (1976), the effective date of the amendment is January 1, 1977. *See* 42 U.S.C.A. §4151, note (West 1977)." *Id.*, n.4.

[11] M.F. Raffa, "Removing Architectural Barriers: The Architectural Barriers Act of 1968," *MPDLR*, 304, 305 (July-August 1985) (hereinafter Raffa). Ms. Raffa, who at that time was General Counsel of the Architectural and Transportation Barriers Compliance Board (ATBCB), was referring to funds issued under the State and Local Assistance Act of 1972, Pub.L. No. 95-512, 86 Stat. 919 (1972). According to Ms. Raffa, as of 1985, 57 percent of the cases filed under the ABA were closed due to the fact that the buildings at issue did not fall within one of the covered categories. The ATBCB's Annual Report for fiscal year 1989 states that 55.5 percent of the complaints received between 1977 and 1989 were closed because the Board lacked jurisdiction. ATBCB Annual Report, chart following p. 7. Presumably the Board's lack of jurisdiction was premised on the fact that the buildings or structures that formed the basis of the complaints did not fall within the coverage of the ABA.

[12] Raffa at 306, *supra* note 11. In the opinion of the authors, this anomaly defeats the purpose of the ABA. Compliance with the ABA is not really achieved when the bathroom is altered but the entrance to the building is not, because in such a circumstance the bathroom is not really accessible.

B. The Architectural and Transportation Barriers Compliance Board

Because the ABA does not contain any provisions regarding enforcement of the Act, initial compliance with the Act was inconsistent. Accordingly, to ensure compliance with the standards prescribed under the ABA, Congress enacted Section 502 of the Rehabilitation Act to create the Architectural and Transportation Barriers Compliance Board (ATBCB or the Board).[13] Pursuant to amendments enacted in 1988, the ATBCB is composed of 23 persons.[14] Twelve members are appointed by the President from the general public, of whom six must be "individuals with handicaps."[15] The remaining members are the heads of the Departments of Health and Human Services, Transportation, Housing and Urban Development, Labor, Interior, Defense, Justice, Veterans Administration and Education, and the heads of the General Services Administration and the United States Postal Service.[16] The chairperson and vice-chairperson of the Board are elected by majority vote of the Board members to serve for terms of one year.[17] One such office must be held by a member representing the general public and the other by a federal official member; the chair must alternate between public and federal members each year.[18] Each public member of the Board is appointed to serve a three-year term, with the terms of four public members expiring each year.[19] The public representative members (but not the federal members) are compensated for their services.[20]

The primary functions of the Board are to ensure compliance with the ABA, to establish minimum guidelines and requirements for the standards to be issued pursuant to the Act, to investigate alternative approaches to eliminating the architectural barriers confronting handicapped people and to make recommendations with respect to the elimination of such barriers to the President and

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[13] 29 U.S.C.A. §792 (1985 and West Supp. 1990).

[14] 29 U.S.C.A. §792(a)(1) (1985 and West Supp. 1990).

[15] 29 U.S.C.A. §792(a)(1)(A) (1985 and West Supp. 1990).

[16] 29 U.S.C.A. §792(a)(1)(B) (1985 and West Supp. 1990). The heads of the named departments may select designees to represent them on the Board, but such designees must hold positions within the specified agencies at executive level IV or higher. *Id.*

[17] 29 U.S.C.A. §792(a)(1) (1985 and West Supp. 1990).

[18] *Id.*

[19] 29 U.S.C.A. §792(a)(2)(A) (West Supp. 1990).

[20] 29 U.S.C.A. §792(a)(5)(A) (1985 and West Supp. 1990).

Congress.[21] In addition, the Board is to examine the transportation and housing difficulties of handicapped people and

> prepare plans and proposals for such further actions as may be necessary to the goals of adequate transportation and housing for individuals with handicaps, including proposals for bringing together in a cooperative effort, agencies, organizations, and groups already working toward such goals or whose cooperation is essential to effective and cooperative action.[22]

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[21] 29 U.S.C.A. §792(b) (1985 and West Supp. 1990) provides as follows:

> It shall be the function of the Board to: (1) insure compliance with the standards prescribed pursuant to the Act of August 12, 1968, commonly known as the Architectural Barriers Act of 1968 [42 U.S.C.A. §§4151-4157] (including the application of that Act to the United States Postal Service) including but not limited to enforcing all standards under that Act, and insuring that all waivers and modifications of standards are based upon findings of fact and are not inconsistent with the provisions of such Act and this section; (2) investigate and examine alternative approaches to the architectural, transportation, communication, and attitudinal barriers confronting individuals with handicaps, particularly with respect to telecommunication devices, public buildings and monuments, parks and parklands, public transportation (including air, water, and surface transportation, whether interstate, foreign, intrastate, or local), and residential and institutional housing; (3) determine what measures are being taken by Federal, State, and local governments and by other public or nonprofit agencies to eliminate the barriers described in clause (2) of this subsection; (4) promote the use of the International Accessibility Symbol in all public facilities that are in compliance with the standards prescribed by the Administrator of General Services, the Secretary of Defense, and the Secretary of Housing and Urban Development pursuant to the Architectural Barriers Act of 1968 [42 U.S.C.A. §§4151-4157]; (5) make to the President and to Congress reports which shall describe in detail the results of its investigations under clauses (2) and (3) of this subsection; (6) make to the President and to the Congress such recommendations for legislation and administration as it deems necessary or desirable to eliminate the barriers described in clause (2) of this subsection; (7) establish minimum guidelines and requirements for the standards issued pursuant to the Act of August 12, 1968, as amended, commonly known as the Architectural Barriers Act of 1968; and (8) insure that public conveyances, including rolling stock, are readily accessible to, and usable by, individuals with physical handicaps.

[22] 29 U.S.C.A. §792(c) (1985 and West Supp. 1990). That section provides in full as follows:

> The Board shall also (1)(A) determine how and to what extent transportation barriers impede the mobility of individuals with handicaps and aged individuals with handicaps and consider ways in which travel expenses in connection with transportation to and from work for individuals with handicaps can be met or subsidized when such individuals are unable to use mass transit systems or need special equipment in private transportation, and (B) consider the housing needs of individuals with handicaps; (2) determine what measures are being taken, especially by public and other nonprofit agencies and groups having an interest in and a capacity to deal with such problems, (A) to eliminate barriers from public transportation systems (including vehicles used in such systems), and to prevent their incorporation in new or expanded transportation systems, and (B) to make housing available and accessible to individuals with handicaps or to meet sheltered housing needs; and (3) prepare plans and proposals for such

When carrying out its functions, the Board is empowered to "conduct investigations, hold public hearings, and issue such orders as it deems necessary to insure compliance with the provisions of [the ABA]. . . ."[23] The Board is also authorized to bring a civil action in federal district court to enforce any final order of the Board, and to intervene or appear as amicus curiae in any civil action that relates to the ABA.[24]

The Board stresses voluntary compliance with the ABA; it does not generally act as a policing agency with respect to enforcement of the Act. However, any person may submit a complaint to the ATBCB claiming that a covered building or facility does not comply with standards issued under the ABA.[25] One who files such a complaint is not a party to the proceeding as a matter of course,[26] but any person, including the complainant, may petition the court for permission "to participate in the proceedings when he/she claims an interest in the proceedings and may contribute materially to their proper disposition."[27] The Board is required to send copies of complaints to all interested agencies and persons, and to apprise any person who might become a party to the compliance proceedings of the complaint and give such persons reasonable opportunity to respond or submit relevant documents.[28] The Executive Director of the Board is required to "seek the cooperation of persons and agencies in obtaining compliance and [to] provide assistance and guidance to help them comply voluntarily."[29] In addition, the Executive Director is authorized to obtain access to all books, records and other sources of information necessary to ascertain compliance, regardless of an agency's or person's claim of privacy.[30]

The Board must attempt informally to resolve all complaints within 180 days after all affected agencies and persons have received the complaint.[31] Within ten

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> further actions as may be necessary to the goals of adequate transportation and housing for individuals with handicaps, including proposals for bringing together in a cooperative effort, agencies, organizations, and groups already working toward such goals or whose cooperation is essential to effective and comprehensive action.

[23] 29 U.S.C.A. §792(d)(1) (1985).

[24] 29 U.S.C.A. §792(d)(2) (1985 and West Supp. 1990). Any such action would be initiated by the Executive Director of the Board (*see* 29 U.S.C.A. §792(e) with respect to the appointment of an Executive Director) at the direction of the Board. *Id.*

[25] 36 C.F.R. §1150.12(a) (1989).

[26] 36 C.F.R. §1150.12(d) (1989).

[27] 36 C.F.R. §1150.13(a) (1989).

[28] 36 C.F.R. §1150.41(a) (1989).

[29] 36 C.F.R. §1150.41(b) (1989).

[30] 36 C.F.R. §1150.41(d) (1989).

[31] 36 C.F.R. §§1150.41(e) and (f) (1989).

days after the termination of the 180-day period, the Executive Director of the Board must either issue a citation or provide a written statement explaining why a citation is considered unnecessary.[32] Any citation issued must specify the relief necessary to ensure compliance with the ABA; such "relief may include the suspension or withholding of funds and/or specific corrective action."[33] A respondent must file an answer within 15 days after receipt of a citation, admitting or denying the allegations and attaching pertinent documents.[34] The answering party may request a hearing if the citation does not state that a hearing will be scheduled;[35] failure to request a hearing constitutes a waiver of the right to a hearing and constitutes "consent to the making of a decision on the basis of available information."[36]

Hearings under the Act are presided over by Administrative Law Judges (ALJs).[37] The ALJ may schedule a prehearing conference and may enter a prehearing order.[38] The parties are empowered to exchange exhibits,[39] and are encouraged to engage in voluntary discovery procedures.[40] The ALJ may order such discovery that he or she "considers to be consistent with and essential to the objective of securing a just and inexpensive determination of the merits of the citation without unnecessary delay."[41] The ALJ also has authority to issue protective orders to shelter a party or person from "annoyance, embarrassment, oppression or undue burden or expense. . . ."[42]

Hearings are conducted only to resolve issues of fact.[43] When no issues of material fact are in dispute, the ALJ may vacate a previously set hearing date.[44] Once a hearing has been conducted, the ALJ is required to issue a decision within 30 days after conclusion of the hearing, or within 30 days after the filing of posthearing briefs.[45] The ALJ's decision must contain findings of fact and conclusions of law, the reasons for all findings, and "other provisions which effectuate the purposes" of the ABA.[46]

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[32] 36 C.F.R. §1150.41(f) (1989).

[33] 36 C.F.R. §1150.42(a) (1989). *See also,* 29 U.S.C.A. §792(d)(1) (1985 and West Supp. 1990).

[34] 36 C.F.R. §§1150.43(a) and (b) (1989).

[35] 36 C.F.R. §1150.45 (1989).

[36] 36 C.F.R. §1150.45 (1989).

[37] 36 C.F.R. §1150.51(a) (1989).

[38] 36 C.F.R. §§1150.61(a) and (b) (1989).

[39] 36 C.F.R. §1150.62 (1989).

[40] 36 C.F.R. §1150.63(a) (1989).

[41] 36 C.F.R. §1150.63(b) (1989).

[42] 36 C.F.R. §1150.63(c) (1989).

[43] 36 C.F.R. §1150.72 (1989).

[44] *Id.*

[45] 36 C.F.R. §1150.102(a) (1989).

The ATBCB is authorized to appoint as many ALJs as are necessary to hear compliance proceedings under the ABA.[47] An ALJ's decision is "deemed to be an order of the Board and shall be the final order for the purpose of judicial review."[48] Any complainant or participant in a compliance proceeding may obtain judicial review of the Board's final order.[49] Because there is no private right of action under the ABA, however, the court's decision is limited to a review of the ALJ's opinion. Accordingly, there has been little judicial interpretation of the ABA.

At the end of each fiscal year, the Board is required to present a report to Congress that includes an assessment of the extent of compliance with the ABA, a description and analysis of investigations made and actions taken by the Board, and the reports and recommendations previously described relating to alternative approaches to the elimination of barriers confronting handicapped people and the measures being taken by governments and agencies to eliminate such barriers.[50]

C. Guidelines and Standards Established Under the ABA

The ATBCB is required to establish minimum guidelines and requirements for all standards issued under the ABA.[51] In accord with that mandate, the Board has established separate guidelines with respect to the accessibility of newly constructed buildings,[52] newly constructed additions to existing buildings,[53] alterations to existing buildings,[54] and leased buildings.[55] In addition, the guidelines include sections dealing with technical provisions[56] and special buildings or facilities.[57] The minimum guidelines established by the ATBCB generally follow the standards for accessibility established by the American National Standards Institute (ANSI) with respect to technical provisions;[58] the ATBCB's guidelines also contain scoping provisions that relate to which and how many spaces and elements are to be made accessible in new construction, additions, alterations, and leased facilities.

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[46] 36 C.F.R. §1150.102(b) (1989).

[47] 29 U.S.C.A. §792(e)(1) (1985).

[48] 29 U.S.C.A. §792(e)(3) (1985). The ATBCB prints a quarterly publication, "Access America," that references citations that have been issued and enforcement actions that have been taken.

[49] 29 U.S.C.A. §792(d)(1) (1985); 36 C.F.R. §1150.104 (1989).

[50] 29 U.S.C.A. §792(g) (1985 and West Supp. 1990). Funds to carry out the duties and functions of the ATBCB have been authorized in the amount of up to three million dollars for each fiscal year through 1991. 29 U.S.C.A. §792(i) (1985 and West Supp. 1990).

[51] 29 U.S.C.A. §792(b) (1985 and West Supp. 1990).

[52] 36 C.F.R. §1190.31 (1989).

[53] 36 C.F.R. §1190.32 (1989).

[54] 36 C.F.R. §1190.33 (1989).

[55] 36 C.F.R. §1190.34 (1989).

[56] 36 C.F.R. §§1190.40 and 1190.50 (1989).

Each of the four agencies referred to in the ABA (the Departments of HUD and Defense, the GSA and the Postal Service) are required to promulgate accessibility *standards* (not guidelines) with respect to buildings under their respective jurisdictions.[59] The standards promulgated by those agencies may contain additional requirements beyond the minimum guidelines established by the ATBCB. In 1984 the four agencies jointly promulgated Uniform Federal Accessibility Standards (UFAS) which are to some extent more stringent than the ANSI standards originally incorporated into the ATBCB guidelines.[60] The UFAS became effective in HUD facilities on October 4, 1984; in Department of Defense facilities on May 8, 1985; in Postal Service facilities on November 15, 1984; and in all other facilities (under the jurisdiction of the GSA) on July 31, 1984.[61]

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[57] 36 C.F.R. §1190.60 (1989).

[58] ANSI "is a private, national organization that publishes recommended standards on a variety of subjects. ANSI's standards for barrier-free design are developed by a committee made up of 52 organizations representing associations of handicapped people, rehabilitation professionals, design professionals, builders, and manufacturers." 54 *Fed. Reg.* 5435 (1989). The first ANSI specifications were issued in 1961; those specifications have been revised over the years. *See* Specifications for Making Buildings and Facilities Accessible to and Usable by the Physically Handicapped, ANSI A117.1. The guidelines enacted by the ATBCB are quite detailed, and incorporate by reference various provisions of the ANSI standards. For the convenience of the reader, the ATBCB guidelines, which are codified at 36 C.F.R. §§1190.31-1190.60 (1989), are set forth in full in appendix F of this text.

[59] 42 U.S.C.A. §§4152-4154(a) (1977 and West Supp. 1990).

[60] See 49 *Fed. Reg.* 31528 (1984).

[61] *See* Raffa, *supra* note 11, at 307 n.8. The GSA standards are codified at 41 C.F.R. §§101-19.601 - 101-19.607 and Appendix A (1989), and the HUD standards are codified at 24 C.F.R. §§40.1-40.6 and Appendix A (1989). The Department of Defense standards are contained in Chapter 18 of DOD 4270.1-M, "Department of Defense Construction Criteria Manual," June 1, 1978, and Department of the Army, Office of the Chief of Engineers, Manual EM 1110-1-103, "Design for the Physically Handicapped," October 15, 1976 (*see* 32 C.F.R. §56.8(c) (1989)). The Postal Service standards are contained in Handbook RE-4, Standards for Facility Accessibility by the Physically Handicapped (*see* 39 C.F.R. §255.3 (1989)).

The ATBCB's Minimum Guidelines and Requirements for Accessible Design (MGRAD) were amended in 1989. *See* 54 *Fed. Reg.* 5434 (1989). "Many of the features of UFAS not contained in the ANSI Standards [first adopted by the ATBCB] were adopted in the 1986 ANSI, which was approved by ANSI on February 5, 1986." 54 *Fed. Reg.* at 5435 (1989). The 1989 modifications made to the MGRAD by the ATBCB "are based primarily on the [1986] standards now promulgated by ANSI and the four standard-setting agencies, with findings from ATBCB research providing additional information and support." *Id.* The MGRADs will have to be further revised by March 1991 to comport with the Americans with Disabilities Act. *See* ADA §504(a)(b)(c) (1990), 136 *Cong. Rec.* H4594 (July 12, 1990).

Each of the four standard-setting agencies is authorized to "modify or waive" any of the standards implemented by that agency on a "case by case" basis upon a finding that "such modification or waiver is clearly necessary. . . ."[62] The ATBCB is responsible for ensuring that all waivers and modifications are "based upon findings of fact and are not inconsistent with . . . [the ABA]."[63] Because each of the agencies having authority to issue waivers is represented on the ATBCB, the actions of such agencies in issuing waivers will not, as a practical matter, be subject to arm's-length review. The possibility that waivers may be easily obtainable under the ABA is one troubling aspect of the Act.

D. Section 504 and Architectural Barriers

Section 504 provides additional protection for handicapped persons seeking to achieve a barrier-free society. Indeed, one of the primary goals of Congress in enacting Section 504 was to eliminate architectural barriers. Among the stated reasons for the passage of Section 504 was

> the lack of action in areas related to rehabilitation which limits a handicapped individual's ability to function in society, *e.g.*, employment discrimination, lack of housing and transportation services and *architectural and transportation barriers.*[64]

Thus, the Supreme Court noted in *Alexander v. Choate*,[65] when holding that Section 504 may be violated absent discriminatory intent: "elimination of architectural barriers was one of the central aims of the Act . . . yet such barriers were clearly not erected with the aim or intent of excluding the handicapped."[66]

The 1989 amendments to the ATBCB's MGRAD were criticized by some commentators. Among the criticisms were that the 1989 standards "would weaken accessibility standards, that the ANSI standards . . . incorporate[d] into MGRAD are inadequate, and that [the 1989 standards are] simply a means of rationalizing poor and inappropriate UFAS provisions." 54 *Fed. Reg.* at 5435 (1989). Another criticism was that it was inappropriate for the ATBCB to "turn over its responsibility for defining what constitutes accessible design to ANSI," because ANSI's primary goal is not to maximize accessibility, and because the Board could not delegate its rulemaking authority to a private organization. *Id.* In addition, it was argued that before any changes were made to the MGRAD, a single national standard for all public and private buildings should be developed. *Id.* The ATBCB rejected those, and other, criticisms. *Id.*

[62] 42 U.S.C.A. §4156 (1977).

[63] 29 U.S.C.A. §792(b) (1985 and West Supp. 1990).

[64] S. Rep. No. 318, 93d Cong., 1st Sess., reprinted in 1973 *U.S. Code Cong. and Admin. News* 2076, 2078 (emphasis added). *See also, Disabled in Action of Pennsylvania v. Pierce*, 606 F. Supp. 310, 313 (E.D. Pa. 1985) (quoting the above cited language and noting that "[t]he legislative history of the Rehabilitation Act reveals that one of its primary intentions was the elimination of architectural barriers").

[65] 469 U.S. 287, 105 S. Ct. 712 (1985).

[66] 469 U.S. at 297, 105 S. Ct. at 717 (citations omitted).

To further the purpose of eliminating architectural barriers, Section 504 mandates accessibility of all federally assisted programs. Thus, the regulations promulgated pursuant to Section 504 generally require existing facilities to be operated so that "the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons."[67] With respect to facilities newly constructed or newly altered by or for recipients of federal financial assistance, the Section 504 regulations generally require that "new facilities shall be designed and constructed to be readily accessible to and usable by handicapped persons," and that "[a]lterations to existing facilities shall, to the maximum extent feasible, be designed and constructed to be readily accessible to and usable by handicapped persons."[68]

Architectural accessibility may be satisfied under Section 504 in a different manner than under the ABA. A recipient may fulfill the program accessibility requirements of the Act under the DHHS regulations, for example,

> through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of [45 C.F.R.] §84.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance [with the accessibility requirements]. In choosing among available methods for meeting [the accessibility requirements], a recipient shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate."[69]

Compliance with the ABA can only be achieved by rendering covered buildings accessible. If a building is not covered by the ABA, however, accessibility is obviously not required under the Act. Under Section 504, however, architectural change is only one means of achieving the required accessibility. If a more expeditious method can ensure equal access to federally assisted programs, such method may be utilized. *All* federally assisted programs must be made accessible under Section 504, however, regardless of whether architectural change is possible or required. In *Rose v. United States Postal Service*[70] the Ninth Circuit explained the relationship between the two Acts, insofar as the accessibility of postal facilities was concerned, as follows:

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[67] *See, e.g.*, 28 C.F.R. §41.57(a) (1989) (DOJ regulation); 45 C.F.R. §84.22(a) (1989) (DHHS regulation). The DOJ regulations further provide that "[t]his paragraph does not necessarily require a recipient to make each of its existing facilities or every part of an existing facility accessible to and usable by handicapped persons." 28 C.F.R. §41.57(a) (1989).

[68] 28 C.F.R. §41.58(a) (1989) (DOJ regulation). *See also*, 45 C.F.R. §84.23 (1989) (DHHS regulation requiring buildings, or parts thereof, newly constructed by or for recipients of federal financial assistance to be "designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by handicapped persons," and requiring newly altered facilities or parts thereof "to the maximum extent feasible, [to] be altered in such manner that the altered portion of the facility is readily accessible to and usable by handicapped persons").

[69] 45 C.F.R. §84.22(b) (1989).

> To meet the requirements of [Section 504 of] the Rehabilitation Act, the same structural modifications that are mandated under the [ABA] *might* be necessary. . . . In certain instances alterations *not* required by the [ABA] . . . might be required to provide access for handicapped employees or to provide access to federal programs. On the other hand, if alternate arrangements satisfying [Section 504] were made, such alterations might not be required. In other words, whether or not structural changes in Postal facilities are required under [Section 504] depends on whether the mandates of [Section 504] can be carried out without structural modifications to provide access.[71]

Because Section 504 requires accessibility of *all* federally assisted activities and programs, regardless of whether such programs or activities are conducted in buildings covered by the ABA, Section 504 will often provide greater protection to handicapped people than the ABA. Moreover, it has been held that a plaintiff who files suit under Section 504 alleging the inaccessibility of a federally assisted program does not have to exhaust administrative remedies under the ABA — even where the program at issue may be conducted in a building covered by the ABA.[72]

Because a private right of action to file suit in federal court exists under Section 504,[73] but no such private right exists under the ABA, a disabled person may wish to file a claim under Section 504 rather than to file an administrative complaint with the ATBCB.[74] In such a case, however, the plaintiff must be aware that the remedy under Section 504 may not encompass architectural changes if other, less obtrusive, methods will achieve accessibility.

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[70] 774 F.2d 1355 (9th Cir. 1984).

[71] 774 F.2d at 1363 (footnote omitted).

[72] *Disabled in Action of Pennsylvania v. Pierce*, 606 F. Supp. 310, 314 (E.D. Pa. 1985)(plaintiffs did not have to exhaust administrative remedies under the ABA prior to filing an action under Section 504 alleging that HUD's newly renovated quarters were not accessible to handicapped people, because Congress intended Section 504 to be "an independent weapon in its barrier-free arsenal").

[73] *See* chapter 3 of this text, *supra*.

[74] Of course, in some cases Section 504 accessibility requirements will be enforced by the Office of Civil Rights of the applicable governing agency. By way of example, representative findings made by DOE's OCR include the following: Letter of Findings of February 16, 1984 in the matter of *Tucson (AZ) Unified School District No. 1*, EHLR 257:513 (Supp. 139, March 1, 1985) (school district violated Section 504 by failing to accommodate the needs of wheelchair-bound and mobility-impaired students for access to and the use of the driver training program; the district corrected the violation, however, by, *inter alia*, modifying cars and/or simulators to meet the needs of disabled students for adaptive controls); Letter of Findings of July 15, 1987 in the matter of *Fort Osage (MO) R-1 School District*, EHLR 352:490 (Supp. 212, March 11, 1988) (district's programs, when viewed in their entirety, were not accessible to mobility-impaired students; district agreed to make numerous modifications, including

In some cases, however, the remedies under Section 504 and the ABA will be the same. Indeed, it has been held that in appropriate circumstances Section 504 requires compliance with the UFAS.[75] A case in point is *Locascio v. St. Petersburg*.[76] That case involved a stadium constructed by the city of St. Petersburg that the parties apparently agreed did not comply with the UFAS. The plaintiffs claimed that the city was in violation of both Section 504 and the ABA. After stating that it must determine whether either or both Section 504 and the ABA applied to the case, the court opined that "[i]f the Court determines that either [Section] 504 or the Barriers Act [the ABA] is applicable[,] adherence to the

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rescheduling classes to more accessible facilities, constructing a ramp to make a covered walkway accessible, and rescheduling accessible transportation routes); Letter of Findings of June 12, 1987 in the matter of *Westwood (MI) Community School District*, EHLR 352:470 (Supp. 209, January 29, 1988) (district violated Section 504 by virtue of the fact that its school board meetings were not accessible to mobility-impaired persons; district voluntarily corrected the problem after the complaint was filed by, *inter alia*, installing a lift in the building, providing a pitcher of water and cups in lieu of accessible water fountains, and installing an accessible public pay phone).

[75] The Section 504 regulations promulgated by the DHHS provide that the design, construction or alteration of facilities in conformance with the ANSI standards satisfy the regulatory requirements that facilities be readily accessible to and usable by handicapped people. 45 C.F.R. §84.23(c) (1989). As noted in note 61 of this chapter, *supra*, however, the ANSI standards currently adopted by the ATBCB as minimum guidelines incorporate the UFAS standards. The ATBCB has stated the following to help alleviate the confusion over this issue:

> In the past year, the U.S. Architectural andTransportation Barriers Compliance Board has made two revisions to the agency's *Minimum Guidelines and Requirements for Accessible Design (MGRAD)*. The final rule incorporating guidelines for leased facilities was published on September 14, 1988 and the final rule incorporating ANSI A117.1-1986, with amendments, and UFAS provisions was published on February 3, 1989.
>
> These revisions to the ATBCB's minimum guidelines have left many people confused about what standards currently apply to facilities constructed under the Architectural Barriers Act (ABA) of 1968 (PL 90-480). The *Uniform Federal Accessibility Standards* (UFAS) is the most recent Federal accessibility standards document issued under the Architectural Barriers Act. As such, it applies to buildings and facilities which are designed, constructed, or altered with Federal funds subsequent to its adoption by the Department of Housing and Urban Development (HUD), General Services Administration (GSA), Department of Defense (DOD), and the U.S. Postal Service (USPS) in 1984.
>
> HUD, GSA, DOD, and USPS are four standard-setting agencies under the ABA. This agency's *Minimum Guidelines and Requirements for Accessible Design* establishes minimum requirements for Federal accessibility standards which must be met when HUD, GSA, DOD, and USPS revise UFAS in the near future.
>
> Since MGRAD is not intended to be used as a standards document, the revised version simply references various provisions of MGRAD (1982), UFAS (1984), and ANSI A117.1 (1986). Both MGRAD and UFAS will continue to be revised over time as improvements in technology and information occur. . . .

ACCESS America, 5, 6 (Spring 1989).

[76] 731 F. Supp. 1522 (M.D. Fla. 1990).

[Uniform] Federal Accessibility Standards is required."[77] The court found that construction of the stadium was a "program or activity" within the meaning of Section 504. Thus, the court held that it need not address "the issue of the application of the Architectural Barrier[s] Act, since the Barrier[s] Act would require the same application of the Federal Accessibility Standards required by Section 504."[78]

II. Housing

A. The Fair Housing Act

1. Introduction

In 1968 Congress passed the Fair Housing Act to prohibit discrimination in both private and public real estate transactions based on race, color, religion, sex or national origin.[79] In 1980 the House of Representatives voted to amend the Fair Housing Act to prohibit discrimination against handicapped people, but the proposed bill failed to pass the Senate.[80] Finally, however, in 1988 Congress enacted the Fair Housing Amendments Act of 1988 to extend coverage of the 1968 Act to prohibit discrimination against disabled people and families with children 18 years of age and younger, and to strengthen the enforcement provisions of the Act.[81] The 1988 Amendments became effective on March 12, 1989.[82] Specifically, with respect to discrimination against handicapped persons, the Fair Housing Act (FHA) provides as follows:

Section 3602(h) of the Act[83] defines the term "handicap" exactly as that term is defined under Section 504 — to encompass persons who have a physical or mental impairment that substantially limits a major life activity, who are regarded as having such an impairment, or who have a record of such an impairment.[84] Thus, Section 504 caselaw on this issue will be directly relevant to cases arising under the Fair Housing Act.

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[77] 731 F. Supp. at 1531.

[78] 731 F. Supp. at 1533.

[79] The Fair Housing Act of 1968, 42 U.S.C.A. §§3601-3631 (1977 and West Supp. 1990). The Act is commonly known as "Title VIII of the Civil Rights Act," or simply as "Title VIII."

[80] H.R. Rep. No. 171, 100th Cong., 2d Sess. 14, reprinted in 1988 *U.S. Code Cong. and Admin. News* 2173.

[81] 42 U.S.C.A. §§3601-3619 (1977 and West Supp. 1990).

[82] Implementation of the Fair Housing Amendments Act of 1988 §§14.115, 100.1-100.400, 103.1-103.515, 104.10-104.955, 106.1-106.2, 109.5-109.30, 110.1-110.25, 115.1-115.11, 121.1, 54 *Fed. Reg.* 3231-3317 (1989) (codified at 24 C.F.R. Part 100).

[83] 42 U.S.C.A. §3602(h) (West Supp. 1990).

As amended, the Act prohibits discrimination on the basis of handicap by a "person in the business of selling or renting dwellings,"[85] which includes private owners as well as real estate agents and brokers. A private owner of a single family dwelling is not subject to any provision of the Act *except* the non-discriminatory advertising provision,[86] however, if: (a) the owner owns three or fewer single family homes,[87] and (b) the dwelling at issue is being sold or rented without the use of a realtor.[88] Moreover, in cases in which the dwelling contains four or fewer independent living quarters, and the owner occupies one of the living quarters as his residence, the owner is not subject to the provisions of the Act.[89]

Discriminatory practices under the Act include discrimination in the rental or sale of housing, discrimination in residential real-estate related transactions, and discrimination in the provision of brokerage services. Each of those practices will be described in this chapter. Additionally, this chapter will discuss the scope of the FHA, burdens of proof under the Act, and enforcement under the Act.

2. Discrimination in the Rental or Sale of Housing

It is illegal under the FHA to discriminate in the sale or rental of a dwelling because of the handicap of: (a) the buyer or renter, (b) a person who will reside in the dwelling after it is sold or rented, or (c) any person associated with the buyer or renter.[90] Moreover, it is illegal to discriminate with respect to the "terms, conditions, or privileges of sale or rental of a dwelling," or with respect to "the provision of services or facilities in connection with such dwelling," due to the handicap of any of the above-named persons.[91] It is *not* illegal, however, to refuse to rent or sell housing to an individual, with or without a handicapping condition, "whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others."[92]

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[84] For a detailed discussion of that definition, as interpreted under Section 504, *see* chapter 4 of this text, *supra*.

[85] *See* 24 C.F.R. §100.20 (1989).

[86] *See* 42 U.S.C.A. §3604(c) (1977 and West Supp. 1990) and the analysis of that section in this chapter.

[87] 24 C.F.R. §100.10(c)(1)(i) (1989).

[88] 24 C.F.R. §100.10(c)(1)(ii) (1989). If the owner selling the dwelling does not reside in the dwelling or was not the most recent resident of the dwelling, however, this exemption applies to only one sale in any 24-month period. *Id.*

[89] 24 C.F.R. §100.10(c)(2) (1989).

[90] 42 U.S.C.A. §3604(f)(1) (West Supp. 1990).

[91] 42 U.S.C.A. §3604(f)(2) (West Supp. 1990). It would constitute discrimination, for example, to charge a handicapped person a higher price to rent or purchase a dwelling, or to make the costs associated with the purchase or lease of a dwelling more costly for handicapped persons. *See, e.g.*, *United States v. Pelzer Realty Co.*, 484 F.2d 438 (5th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974)

For purposes of the prohibition against discrimination in the rental or sale of housing, the term "discrimination" includes: (a) the refusal to allow a handicapped individual to make reasonable modifications of existing premises at his or her own expense;[93] (b) the refusal to make reasonable accommodations in rules, practices or services when necessary to allow a handicapped person equal use and enjoyment of the premises;[94] and (c) the failure to design and construct multifamily dwellings (to be first occupied after March 13, 1991) so that such dwellings are accessible to handicapped people.[95]

With respect to the latter requirement, the term "multifamily dwelling" means:

> (A) buildings consisting of 4 or more units if such buildings have one or more elevators; and
>
> (B) ground floor units in other buildings consisting of 4 or more units.[96]

Newly constructed multifamily dwellings must be designed so that the public and common use portions are "readily accessible to and usable by handicapped

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(requiring black persons to pay closing costs with respect to the sale of housing, when white persons did not have to pay such costs, violated the Fair Housing Act of 1968); *Clark v. Universal Builders, Inc.*, 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974) (charging higher fees to black persons than white persons would constitute a violation of the Fair Housing Act of 1968).

[92] 42 U.S.C.A. §3604(f)(9) (West Supp. 1990).

[93] 42 U.S.C.A. §3604(f)(3)(A) (West Supp. 1990). When rental of property is involved, the landlord may, under reasonable circumstances, require the renter to restore the premises to their pre-modified existence. Landlords may not increase the required security deposit when renting to disabled persons, however, although as part of the restoration agreement a landlord may require the tenant to set aside reasonable funds in an interest bearing escrow account. *See* 24 C.F.R. §100.203(a) (1989). Moreover, a landlord may require the tenant to provide reasonable descriptions of proposed modifications plus "reasonable assurances that the work will be done in a workmanlike manner and that any required building permits will be obtained." *Id.*

[94] 42 U.S.C.A. §3604(f)(3)(B) (1989). *See also*, 24 C.F.R. §100.204 (1989) (explaining that reasonable accommodations would include allowing a blind person to have a seeing-eye dog in an apartment complex that prohibited pets, or permitting a mobility-impaired person to have a permanent, close-in parking space in an apartment complex where parking spaces are not reserved).

[95] 42 U.S.C.A. §3604(f)(3)(C) (West Supp. 1990).

[96] 42 U.S.C.A. §3604(f)(7)(A) and (B) (West Supp. 1990). Under this definition, it appears that in dwellings containing four or more units a dwelling containing an elevator must be constructed so that *all* units are accessible, while a dwelling that does not contain an elevator must be constructed so that only the ground floor units are accessible. The Act does not appear to cover situations in which the ground floor is available only for parking and the lowest dwelling units actually appear on the second

persons";[97] so that all doors are wide enough to allow wheelchair passage;[98] and so that all premises within such dwellings contain accessible routes into and through the dwelling, accessible light switches and environmental controls, reinforcements in bathroom walls to allow later installation of grab bars, and "usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space."[99] All covered multifamily dwellings must have one building entrance on an accessible route unless it is impractical to do so because of the terrain or unusual characteristics of the site.[100]

Interestingly, the 1968 FHA prohibited the discriminatory refusal to *negotiate* for the sale or rental of a dwelling, or to "refuse to sell or rent after the making of a *bona fide* offer," because of "race, color, religion, sex, or national origin."[101] Under this section, for example, a landlord who hides or refuses to answer the door when black persons come to inquire about leasing or purchasing a dwelling would be in violation of the Act, as would management personnel who refuse to deal with persons of minority races.[102] When enacting the Fair Housing Amendments Act of 1988 to amend the 1968 Act, however, Congress did *not* amend the statutory section prohibiting the discriminatory refusal to negotiate to extend that provision

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floor. In such situations, the definition of the term "multi-family dwelling" would appear to exempt compliance with the Act, in that *none* of the dwelling units need be accessible.

Although the language of 42 U.S.C.A. §3604(f)(7)(B) (West Supp. 1990), when read literally, limits the definition of a multi-family dwelling to only the living units, in the opinion of the authors this restricted application cannot be sustained. Such an interpretation would render the statutory provision of 42 U.S.C.A. §3604(f)(3)(C)(i) (West Supp. 1990) — which requires accessibility of public and common-use portions of multi-family dwellings — meaningless. This would violate the basic principle of statutory construction that meaning should be given to all statutory language. Further, to interpret the Act as not requiring accessibility of public and common-use portions of multi-family dwellings would defeat the purpose of requiring accessible living units, since disabled persons would be unable to reach the accessible living units via nonaccessible public-use portions.

[97] 42 U.S.C.A. §3604(f)(3)(C)(i) (West Supp. 1990).

[98] 42 U.S.C.A. §3604(f)(3)(C)(ii) (West Supp. 1990).

[99] 42 U.S.C.A. §3604(f)(3)(C)(iii) (West Supp. 1990). Compliance with ANSI A117.1 would suffice to satisfy the requirements of this paragraph. 42 U.S.C.A. §3604(f)(3)(C)(iv) (West Supp. 1990). (For a discussion of ANSI standards *see* section I of this chapter, *supra*.) Further, if a state or local government has incorporated into its laws the requirements of this section, compliance with such laws will satisfy the stated requirements. 42 U.S.C.A. §3604(f)(5)(A) (West Supp. 1990).

[100] 24 C.F.R. §100.205(a) (1989). Under this section a developer would not be precluded from building inaccessible multi-family units on a site with a hilly terrain requiring a "long and steep stairway in order to enter the dwelling." *Id.*

[101] 42 U.S.C.A. §3604(a) (1977 and West Supp. 1990).

[102] *See, e.g., Williamson v. Hampton Management Co.*, 339 F. Supp. 1146 (N.D. Ill. 1972) (refusal to deal with two black women who sought to rent an apartment violated the FHA); *Miller v. Apartments and Homes of New Jersey, Inc.*, 646 F.2d 101 (3d Cir. 1981) (refusal to deal with black prospective apartment renters violated the Act); *Crumble v. Blumthal*, 549 F.2d 462 (7th Cir. 1977) (refusal to deal with black prospective purchasers of a home violated the Act).

to protect handicapped persons. Rather, Congress expanded that provision to prohibit discriminatory negotiations based on familial status but *not* on handicap.[103] When looking just to the statutory language, therefore, it appears that it would *not* constitute a violation of the Act for a landlord to hide or refuse to answer the door when a visibly disabled person (such as a person in a wheelchair) came to inquire about leasing or purchasing a dwelling; nor would it violate the Act for management personnel to refuse to deal with a disabled person.[104]

The statutory language of the Act seems incomprehensible. Indeed, the HUD regulations enacted pursuant to the 1988 Amendments simply ignore the anomaly, and provide specifically that prohibited discrimination under the Act includes:

> (1) *Failing to accept or consider a bona fide* offer because of race, color, religion, sex, *handicap*, familial status, or national origin.
>
> (2) *Refusing* to sell or rent a dwelling to, or *to negotiate for the sale or rental* of a dwelling with, any person because of race, color, religion, sex, *handicap*, familial status, or national origin.
>
> (3) Imposing different sales prices or rental charges for the sale or rental of a dwelling upon any person because of race, color, religion, sex, *handicap*, familial status, or national origin.
>
> (4) Using different qualification criteria or applications, or sale or rental standards or procedures, such as income standards, application requirements, application fees, credit analysis or sale or rental approval procedures or other requirements, because of race, color, religion, sex, handicap, familial status, or national origin.
>
> (5) Evicting tenants because of their race, color, religion, sex, *handicap*, familial status, or national origin or because of the race, color, religion, sex, *handicap*, familial status, or national origin of a tenant's guest.[105]

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[103] 42 U.S.C.A. §3604(a) (1977 and West Supp. 1990).

[104] Similarly, Section 3604(a) of the 1968 Act makes it illegal to "otherwise make unavailable or deny . . . a dwelling to any person because of race, color, religion, sex, or national origin." As amended in 1988, it is illegal to "otherwise make unavailable or deny . . . a dwelling to any person because of . . . familial status. . . ." 42 U.S.C.A. §3604(2) (West Supp. 1990). It is *not*, however, illegal to "otherwise make unavailable or deny" a dwelling to any person because of handicap. Thus, while courts have held that it is unlawful to abuse the real estate marketing system to deny housing to members of a protected class (*see, e.g.*, *Fair Housing Council of Bergen County, Inc. v. Eastern Bergen County Multiple Listing Service, Inc.*, 422 F. Supp. 1071 (D.N.J. 1976)), to engage in zoning practices that effectively deny housing to members of a protected class (*see, e.g.*, *Metro. Housing Development Corporation v. Arlington Heights*, 616 F.2d 1006 (7th Cir. 1980)), or to engage in steering practices to deny housing to members of a protected class (*see, e.g.*, *Zuch v. Hussey*, 366 F. Supp. 553 (E.D. Mich. 1973), *aff'd*, 547 F.2d 1168 (6th Cir. 1977); *Village of Bellwood v. Gladstone Realtors*, 569 F.2d 1013 (7th Cir. 1978), *modified*, 441 U.S. 91 (1979)), the statutory language of the Act does not declare it illegal to utilize such practices to deny housing to handicapped people.

[105] 24 C.F.R. §100.60(b) (1989) (emphasis added).

It is also illegal under the Act to: (1) represent to any member of any of the statutorily protected classes, including disabled people, that "any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available;[106] or (2) "[f]or profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood. . . ." of persons in any of the statutorily protected classes, including handicapped persons.[107] The HUD regulations detail specific practices that are illegal under these provisions.[108]

This section of the Act (dealing with discrimination in the rental or sale of housing) also prohibits discriminatory advertising practices — namely the indication of "preference, limitation or discrimination" based on any of the protected categories.[109] This proviso *has* been statutorily extended by the 1988 Amendments to protect handicapped individuals.[110] Thus, for example, owners of apartment houses or developers of housing projects may not advertise in such a manner that would appear to exclude disabled persons or to reflect a bias against disabled persons. Whether this provision would require that housing advertisements featuring human models include disabled people among the classes of persons represented by the models, however, is unclear.[111]

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[106] 42 U.S.C.A. §3604(d) (1977 and West Supp. 1990).

[107] 42 U.S.C.A. §3604(e) (1977 and West Supp. 1990).

[108] *See, e.g.*, 24 C.F.R. §§100.80 and 100.85 (1989). The regulations provide, for instance, that it is illegal to engage in conduct that infers that a neighborhood is undergoing a change in the persons residing in it with respect to any of the protected categories (24 C.F.R. §100.85(c)(1) (1989)), or to encourage a person to sell or rent a dwelling through assertions that entry into the neighborhood of members of any of the protected classes would have undesirable consequences to the neighborhood (24 C.F.R. §185.85(c)(2) (1989)).

[109] 42 U.S.C.A. §3604(c) (1977 and West Supp. 1990).

[110] *Id.*

[111] The HUD regulations do not answer that question. The regulations addressing selective advertising simply provide:

> *Selective use of human models when conducting an advertising campaign.* Selective advertising may involve an advertising campaign using human models primarily in media that cater to one racial or national origin segment of the population without a complementary advertising campaign that is directed at other groups. Another example may involve use of racially mixed models by a developer to advertise one development and not others. Similar care must be exercised in advertising in publications or other media directed at one particular sex, or at persons without children. Such selective advertising may involve the use of human models of members of only one sex, or of adults only, in displays, photographs or drawings to indicate preferences for one sex or the other, or for adults to the exclusion of children.

24 C.F.R. §109.25(c) (1989).

At least two courts have considered whether the management of housing developments or apartment complexes violated the FHA by failing to include an adequate number of minority models in their advertisements. In *Saunders v. General Services Corp.*,[112] the court held that management of a housing complex violated the FHA by publishing a brochure containing a "paucity of black models" which "indicate[d] a racial preference to the ordinary reader."[113] The court refused, however, to grant [the] plaintiffs' request for injunctive relief ordering the defendants "to modify their advertising to comply with the law, [by] including blacks in their advertising in numbers proportionate to their percentage in the population of the [applicable] metropolitan area."[114] The court stated that "plaintiffs are not entitled by law to force defendants to give proportional representation to blacks in their advertising,"[115] and limited the plaintiffs' remedies to declaratory relief and damages.

And, in *Spann v. Colonial Village, Inc.*[116] the court held that a housing developer did not violate the FHA where 28 percent of the developer's ads during the applicable limitations period featured black models, and where all the ads included an equal opportunity slogan and logo. The court rejected the proposition that "proportional representation of the models of each race in all advertising" was required.[117] The court stated:

> In addition to being an overbroad application of section 3604(c), such an interpretation could render impractical advertising with human models, for it would mean that every advertisement made or published would have to include at least one model representative of each minority in the relevant community. Consequently, a housing ad with a broad target market might have to include numerous models, and advertisements featuring only one or two models could on that basis alone be regarded as violating section 3604(c). The obvious consequence would be that housing advertisements with human models would become virtually non-existent.[118]

It is important to note, however, that in both *Saunders* and *Spann v. Colonial Village* the advertisements at issue included some minority representatives, albeit a disproportionately small number of such representatives. It is arguable, therefore, that while a proportionate number of disabled models is not required, a series of advertisements featuring human models must include at least *one* disabled model.

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[112] 659 F. Supp. 1042 (E.D. Va. 1987).

[113] 659 F. Supp. at 1058.

[114] 659 F. Supp. at 1059.

[115] 659 F. Supp. at 1060.

[116] 662 F. Supp. 541 (D.D.C. 1987), *rev'd on other grounds*, 899 F.2d 24 (D.D.C. 1990).

[117] 662 F. Supp. at 544.

[118] 662 F. Supp. at 545.

In a related case to *Spann v. Colonial Village*, *Spann v. The Carley Capital Group*,[119] the same court noted:

> it may be that the conditions referred to in *Colonial Village* as establishing violations are present here. Plaintiffs claim . . . [without contradiction] that . . . advertisements were published by the defendants that failed to include a single black model, and that in other respects as well interracial discrimination occurred. On this basis, there is no warrant for dismissing the complaints. . . .[120]

In *Ragin v. Steiner, Clateman and Associates*[121] the court summarized the two *Spann* decisions as follows:

> *Spann* [*v. Colonial Village*] . . . is entirely distinguishable from a case in which only all white models appear in advertising. In *Spann* [*v. Colonial Village*], during the relevant period, the defendants ran ads with both white and black models. Judge Greene held that §3604(c) did not require a flat rule of mathematical proportionality and that the Fair Housing Act was not violated merely because models of a particular race were not used in one ad or series of ads. . . . [In *Spann v. The Carley Capital Group*] Judge Greene has himself distinguished this circumstance from one in which only white models have been consistently used.[122]

Thus, the court in *Ragin* refused to dismiss a claim under section 3604(c) of the FHA in which the plaintiffs complained that the defendants published 27 separate display ads over an 18-month period with all white models, and that when asked to use non-white models in future ads the defendants changed their advertising to ads without human models.

It has been held, however, that *some* discriminatory motive — express or implied — must be shown to establish an advertising violation of the FHA. In *Spann v. Colonial Village* the court held that discriminatory *intent* must be proven, but that such intent may be shown by direct *or* circumstantial evidence. In *Saunders* the court took a more modified approach. That court held that while the plaintiffs did not have to "establish that the defendants intended to express a racial preference" in order to prevail on a discriminatory advertising claim under the FHA, to prove a violation of the Act it must be shown that " '[t]o an ordinary reader the natural interpretation of the advertisements . . . is that they indicate a racial preference in the acceptance of tenants.' "[123] In accord with the reasoning of these courts, to establish a violation of the advertising section of the FHA it would not be sufficient to show that housing advertisements excluded models of disabled persons. It would also have to be shown that the lack of disabled models was expressly or implicitly premised on a discriminatory motive.

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[119] Nos. 87-0054, 1154-56, slip op., (D.D.C. December 13, 1989) (available on Lexis genfed library).

[120] Slip op. at 7.

[121] 714 F. Supp. 709 (S.D.N.Y. 1989).

[122] 714 F. Supp. at 713.

The advertising proviso of the Act also prohibits the making or publication of discriminatory notices or statements. The HUD regulations provide that discriminatory notices, statements and advertisements include (but are not limited to):

> (1) Using words, phrases, photographs, illustrations, symbols or forms which convey that dwellings are available or not available to a particular group of persons because of race, color, religion, sex, handicap, familial status, or national origin.
>
> (2) Expressing to agents, brokers, employees, prospective sellers or renters or any other persons a preference for or limitation on any purchaser or renter because of race, color, religion, sex, handicap, familial status, or national origin of such persons.
>
> (3) Selecting media or locations for advertising the sale or rental of dwellings which deny particular segments of the housing market information about housing opportunities because of race, color, religion, sex, handicap, familial status, or national origin.
>
> (4) Refusing to publish advertising for the sale or rental of dwellings or requiring different charges or terms for such advertising because of race, color, religion, sex, handicap, familial status, or national origin.[124]

3. Discrimination in Residential Real Estate-Related Transactions

Section 3605(a) of the FHA provides:

> It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.[125]

The term "residential real estate-related transaction" refers to the "making or purchasing of loans or providing other financial assistance" with respect to the purchase, construction, improvement or maintenance of a dwelling, and to the "selling, brokering or appraising of residential real property."[126] Again, the HUD regulations list detailed practices that are considered illegal in violation of this provision.[127]

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[123] 659 F. Supp. at 1058 (citing *United States v. Hunter*, 459 F.2d 205, 215 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972), where the Fourth Circuit held that a classified ad listing an apartment for rent in a "private white home" indicated a racial preference in violation of the Fair Housing Act).

[124] 24 C.F.R. §100.75(c)(1)-(4) (1989).

[125] 42 U.S.C.A. §3605(a) (West Supp. 1990).

4. Discrimination in the Provision of Brokerage Services

Section 3606 of the FHA prohibits discrimination on the basis of handicap in the provision of brokerage services, as well as on the basis of race, color, religion, sex, familial status or national origin.[128] The HUD regulations provide that prohibited actions under this section include, but are not limited to, setting different fees for membership in a multiple-listing service; denying or limiting benefits accruing to members in a real estate brokers' organization; or establishing geographic boundaries, office location or residence requirements for access to or membership in any real estate-related organization—based on an individual's membership in any of the statutorily protected categories.[129]

5. Scope and Burdens of Proof

The FHA is intended to apply to all conduct that effectuates the denial of equal access to housing by handicapped people, however facially neutral such conduct may be. The House Report discussing the 1988 Amendments states:

> Another method of making housing unavailable to people with disabilities has been the application or enforcement of otherwise neutral rules and regulations on health, safety and land-use in a manner which discriminates against people with disabilities. Such discrimination often results from false or over-protective assumptions about the needs of handicapped people, as well as unfounded fears of difficulties about the problems that their tenancies may pose. These and similar practices would be prohibited [by the 1988 Amendments].[130]

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[126] 42 U.S.C.A. §3605(b) (West Supp. 1990).

[127] *See, e.g.*, 24 C.F.R. §100.120 (1989) (prohibited practices include failing to provide information regarding the availability of loans, application requirements or procedures, or providing false information, based on an applicant's statutorily protected classification); §100.125 (it is unlawful to purchase some loans but not others, to pool or package some loans but not others or to impose different terms or conditions with respect to the marketing or sale of securities secured by a dwelling—based upon any statutorily protected classification); §100.130 (it is unlawful to follow different practices or procedures when determining creditworthiness for a loan or the type of loan to be provided based on any protected classification); §100.135 (it is unlawful for the appraisal value of residential real property to take into consideration factors based on any statutorily protected classification).

[128] 42 U.S.C.A. §3606 (1977 and West Supp. 1990).

[129] 24 C.F.R. §100.90 (1989).

[130] H. Rep. No. 171, 100th Cong., 2d Sess. 24, reprinted in 1988 *U.S. Code Cong. and Admin. News* 2173.

Thus, while the Act provides that it does not limit "the applicability of any reasonable local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling,"[131] that proviso should not be interpreted to permit zoning regulations that discriminate against persons with disabilities. The House Report notes that the 1988 Amendments

> would also apply to state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps. While state and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. This has been accomplished by such means as the enactment or imposition of health, safety or land-use requirements on congregate living arrangements among non-related persons with disabilities. Since these requirements are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discriminating against persons with disabilities.
>
> The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices. The Act is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community.[132]

The HUD regulations, however, do not address the zoning issue, because "land use and zoning cases are to be litigated . . . by the Department of Justice" rather than by HUD.[133]

Moreover, the Act has been consistently interpreted as prohibiting both conduct that is *intentionally* discriminatory and conduct that has a discriminatory

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[131] 42 U.S.C.A. §3607(b)(1) (West Supp. 1990).

[132] H. Rep. No. 171, 100th Cong., 2d Sess. 24, reprinted in 1988 *U.S. Code Cong. and Admin. News* 2173.

[133] *Id.* One of the first cases filed by the Department of Justice (DOJ) under the FHA as amended in 1988 is *United States v. City of Chicago*, No. 88-C-4981 (N.D. Ill. 1989). In that case, the DOJ alleged that the city of Chicago violated the FHA by refusing to grant a zoning variance permitting the Residential Facilities Management Services (RFMS) to build a home for developmentally disabled adults between the ages of 18-25 in a residential neighborhood. The parties entered into a consent agreement in January 1990, pursuant to which the city agreed to allow construction of the group home and to pay $30,000 in damages to RFMS and $1,000 to each of the first 15 residents of the home (a total of $45,000). That agreement was approved by the court [Consent agreement entered January 10, 1990]. Subsequently, in March 1990 the DOJ entered into a consent agreement prohibiting a Virginia property management company from refusing to rent apartments to recovering drug abusers who are participating in a county substance abuse program. *United States v. Sigal/Zuckerman, Inc.*, CV 90-0059 (E.D. Va. March 16, 1990).

impact on members of a protected class.[134] By way of example, in *Huntington Branch, NAACP v. Town of Huntington*[135] the plaintiffs claimed that a town violated the FHA when it refused to amend an ordinance—that restricted private multifamily housing projects to a minority urban renewal area—in order to allow construction of subsidized housing in a non-minority neighborhood. This was a "disparate impact" case, which required examination of a "facially-neutral policy or practice" (a zoning law) "for its differential impact or effect on a particular group."[136] The circuit court noted that "[t]he Act's stated purpose to end discrimination requires a discriminatory effect standard; an intent requirement would strip the statute of all impact on de facto segregation."[137] As stated by another court, "[e]ffect, not motivation, is the touchstone because a thoughtless housing practice can be as unfair to minority rights as a willful scheme."[138]

The primary issue in *Huntington*, however, was not whether discriminatory intent is required to prove a violation of the FHA, but whether proof of discriminatory intent is necessary for the plaintiff to establish a *prima facie* case of discrimination in a disparate impact case,[139] thereby shifting the burden of proof to the defendant to establish that no violation of the Act occurred. In *Huntington* the

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[134] *Spann v. Colonial Village Inc.*, discussed in the previous section of this chapter, is a rare exception. In that case the court held that discriminatory intent was required to show a violation of the Act's prohibition against discriminatory advertising.

[135] 844 F.2d 926 (2d Cir. 1988), *aff'd*, 488 U.S. 15, 109 S. Ct. 276 (1988) (*per curiam*).

[136] 844 F.2d at 933.

[137] 844 F.2d at 934. The court cited numerous cases holding that discriminatory intent is not required to establish a violation of the FHA. For other cases holding that discriminatory intent is not required under the Act, *see, e.g.*, *Hamilton v. Svatik*, 779 F.2d 383, 387 (7th Cir. 1985) (Section 3604 does not require proof of discriminatory intent); *Fox v. U.S. Department of Housing and Urban Development*, 468 F. Supp. 907, 915 (E.D. Pa. 1979) (under the FHA "plaintiffs need not show . . . that defendants' discriminatory acts were done intentionally"); *Kaplan v. 442 Wellington Cooperative Building Corporation*, 567 F. Supp. 53, 56 (N.D. Ill. 1983) ("[u]nder Section 3604, the cases have long held generally that an action . . . which might have a discriminatory effect . . . is prohibited unless [justified] . . . "); *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1036 (2d Cir. 1979) (". . . in order to prove a prima facie case of race discrimination [under the FHA] plaintiffs needed to show only that the action complained of had a racially discriminatory effect . . ."). For other cases making the same or similar statements, *see, e.g.*, *Metropolitan Housing Development Corporation v. Arlington Heights*, 558 F.2d 1283, 1287-90 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 146-48 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *United States v. City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *United States v. Youritan Construction Co.*, 370 F. Supp. 643, 648 (N.D. Cal. 1973), *aff'd in part and remanded in part*, 509 F.2d 623 (9th Cir. 1975); *Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir.), *cert. denied*, 419 U.S. 1021 (1974); *Hanson v. Veterans Administration*, 800 F.2d 1381, 1386 (5th Cir. 1986).

[138] *Smith v. Anchor Building Corporation*, 536 F.2d 231, 233 (8th Cir. 1976).

[139] A "*prima facie*" case is one in which a violation of the Act would be established unless disproved by some evidence to the contrary.

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Second Circuit held that to establish a *prima facie* case the plaintiff need only show that the challenged conduct has a discriminatory impact—not that the conduct was motivated by discriminatory intent. According to the Second Circuit, the burden then shifts to the defendant to show: (a) "bona fide and legitimate" reasons for the challenged action, and (b) that no "less discriminatory alternative can serve those ends."[140] When affirming the Second Circuit's ruling in *Huntington* that the defendants had violated the FHA, the Supreme Court declined to "reach the question whether that test is the appropriate one."[141] The Court simply stated that "[w]ithout endorsing the precise analysis of the Court of Appeals, we are satisfied on this record that disparate impact was shown, and that the sole justification proffered to rebut the *prima facie* case was inadequate."[142] Thus, while numerous lower courts have held that a showing of discriminatory or segregative impact is sufficient to establish a *prima facie* case of discrimination in a disparate impact case under the Act,[143] the Supreme Court has not yet defined the appropriate test to be followed.

It should be noted that individual claims under the FHA involve a claim of disparate *treatment* (which involves discriminatory intent), rather than the disparate *impact* usually claimed in a pattern or practice case. In such cases proof of disparate treatment will establish a *prima facie* case, and the burden will then shift to the defendant to show a valid justification for the challenged conduct.[144] Even where disparate treatment is claimed, however, it is not necessary that the plaintiff show that the defendant's conduct was motivated *entirely* by the protected classification at issue, such as the race or handicap of the plaintiff.[145] A violation of the Act will be established if it is shown that the protected classification, such as race or handicap, played a *part* in the defendant's decision or conduct.

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[140] 844 F.2d at 939.

[141] 488 U.S. 15, 16, 109 S. Ct. 276, 277 (1988).

[142] *Id.* The Second Circuit found that evidence of disproportionate harm to black persons and a segregative impact were sufficient to establish a *prima facie* case.

[143] *See, e.g., Keith v. Volpe*, 858 F.2d 467 (9th Cir. 1988), *cert. denied*, 110 S. Ct. 61 (1989); *United States v. Starrett City Associates*, 840 F.2d 1096 (2d Cir.), *cert. denied*, 109 S. Ct. 376 (1988); *Arthur v. Toledo*, 782 F.2d 565 (6th Cir. 1986); *Betsey v. Turtle Creek Associates*, 736 F.2d 983 (4th Cir. 1984); *Halet v. Wend Investment Co.*, 672 F.2d 1305 (9th Cir. 1982); *United States v. Parma*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982); *United States v. Mitchell*, 580 F.2d 789 (5th Cir. 1978); *United States v. Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *United States v. Pelzer Realty Co.*, 484 F.2d 438 (5th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

There is some disagreement among the lower courts, however, as to the extent of discriminatory effect that must be shown, and even as to whether discriminatory effect alone, absent some form of discriminatory intent, is sufficient to establish a *prima facie* violation of the Act. The Third and Eighth Circuits have held that proof of discriminatory effect alone is always sufficient. *See, e.g., Resident Advisory Board v. Rizzo*, 564 F.2d 126, 146-48 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *United States v. Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). The Fourth and Seventh Circuits, however, require examination of four factors:

> (1) the strength of the plaintiff's showing of discriminatory effect, (2) whether there was some evidence of discriminatory intent, (3) what the defendant's interest was in taking the action complained of, and (4) whether the plaintiff sought to compel the defendant affirmatively to provide housing for minorities or merely to restrain the defendant from interfering with individual property owners who wished to provide such housing.

Keith v. Volpe, 858 F.2d 467, 483 (9th Cir. 1988) (citing *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982), and *Metropolitan Housing Development Corporation v. Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978)), *cert. denied*, 110 S. Ct. 61 (1989).

6. Enforcement

Responsibility for enforcing the FHA lies with the Secretary of HUD.[146] A private individual who is an "aggrieved person" may also sue directly under the Act, however.[147] An "aggrieved person" under the Act is one who has either been injured by a discriminatory housing practice or believes that he or she will be "injured by a discriminatory housing practice that is about to occur."[148] The term "aggrieved person" has been broadly interpreted by the courts.[149]

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[144] For examples of cases following the disparate treatment analysis, *see Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032 (2d Cir. 1979); *Smith v. Anchor Building Corporation*, 536 F. 2d 231 (8th Cir. 1976); *Williams v. Matthews Co.*, 499 F.2d 819 (8th Cir.), *cert. denied*, 419 U.S. 1027 (1974); *Old West End Association v. Buckeye Federal Savings and Loan*, 675 F. Supp. 1100 (N.D. Ohio 1987).

[145] *See, e.g., Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1042 (2d Cir. 1979) (stating that discriminatory action "violates 3604(a) if race is even one of the motivating factors," and citing numerous cases holding the same); *United States v. Mitchell*, 580 F.2d 789, 791 (5th Cir, 1978) (it must only be shown that race was one consideration and "played some role" in the real estate transaction at issue to establish a violation of the FHA); *Hanson v. Veterans Administration*, 800 F.2d 1381, 1386 (5th Cir. 1986) (to state a claim under the FHA "it is enough to show that race was a consideration and played some role in a real estate transaction").

[146] 42 U.S.C.A. §3608 (1977 and West Supp. 1990).

[147] 42 U.S.C.A. §3612 (1977 and West Supp. 1990).

[148] 24 C.F.R. §100.20 (1989).

[149] For illustrative cases under the 1968 Act, *see, e.g., Halet v. Wend Investment Co.*, 672 F.2d 1305, 1309 (9th Cir. 1982) (white person had standing to raise a claim under the FHA alleging that an adults-only rental policy in an apartment complex was racially discriminatory against blacks and minorities; since the white plaintiff was denied an apartment because of the adults-only policy he was injured thereby, notwithstanding that he was not a member of a minority race); *Keith v. Volpe*, 858 F.2d 467, 477 (9th Cir. 1988) (plaintiffs had standing to sue under the FHA based on a city's refusal to approve construction of low-income housing for residents displaced by freeway construction because: (a) the plaintiffs lived in the city, (b) they would apply to live in the low-income housing project, and (c) evidence showed that they would be eligible to live in that project), *cert. denied*, 110 S. Ct. 61 (1989).

Courts have held the standing requirement satisfied based on such factors as the plaintiff's residence in the community. *See, e.g., Smith v. Cleveland Heights*, 760 F.2d 720 (6th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986). In addition, courts have granted standing to fair housing organizations (*see, e.g., Fair Housing Council of Bergen County, Inc. v. Eastern Bergen Multiple Listing Service, Inc.*, 422 F. Supp. 1071 (D.N.J. 1976)), local government units (*see, e.g., Heights Community Congress v. Hilltop Realty,* Prior to the 1988 Amendments, the FHA was labeled as lacking "enforcement teeth."[150] The House Report discussing the proposed Fair Housing Amendments Act of 1980 (the predecessor to the 1988 Amendments)[151] explained:

> The primary weakness in the existing law derives from the almost total dependence upon private efforts to enforce its provisions. For financially capable victims of housing discrimination, the Act has provided litigation remedies. For the vast majority of victims, however, this course of action is not feasible. Alternative enforcement under [the 1969 Act] is limited to "pattern and practice" cases brought by the Attorney General. While these cases have dealt with virtually every important type of discrimination, and have had a significant impact on the state of the law, relief for individual victims of housing discrimination has not been readily available through this avenue.[152]

The 1988 Amendments are intended to rectify this problem.

Inc., 774 F.2d 135 (6th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986)), and real estate agents (*see, e.g.*, *Wilkey v. Pyramid Construction Co.*, 619 F. Supp. 1453 (D. Conn. 1985).

In appropriate circumstances, an organization of disabled people would have standing to file suit against an entity that allegedly discriminated against people with disabilities in violation of the FHA, either on its own behalf, or in a representative capacity on behalf of its members. In *Havens Realty Corporation v. Coleman*, 455 U.S. 363, 102 S. Ct. 1114 (1982), the Supreme Court held that HOME, an organization promoting equal opportunity housing that operated a housing counselling service and investigated complaints of housing discrimination, had standing on its own behalf to assert a claim that the defendants' racial steering practices frustrated HOME's counseling and referral services and caused a drain on its resources. Lower courts have disagreed with respect to the degree of injury that the defendant's practice must cause the plaintiff organization before the latter will be found to have standing, however. *Compare, e.g.*, *Saunders v. General Services Corporation*, 659 F. Supp. 1042 (E.D. Va. 1987) (organization can sue on its own behalf where the defendant's conduct would frustrate the group's activities), with *Williams v. Adams*, 625 F. Supp. 256, 260 (N.D. Ill. 1985) ("it is not enough that an organization allege that a . . . defendant's conduct is against the policies or goals of that organization."). *See also*, *Spann v. Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir. 1990) (four housing organizations had standing to assert claims on their own behalf under the FHA where it was alleged that "defendants' preferential advertising tended to steer black home buyers and renters away from the advertised complexes and this impelled the organizations to devote resources to checking on neutralizing the ads' adverse impact"; and (2) the advertisements at issue "required [the organizations] to devote more time, effort and money to endeavors designed to educate not only black home buyers and renters, but the D.C. area real estate industry and the public that racial preference in housing is indeed illegal"). For a general discussion of what is required for representational standing, *see* text at note 87 of chapter 3, *supra*.

[150] *See, e.g.*, J.A. Kushner, "The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing," 42 *Vanderbilt Law Review* 1049, 1087 (1989). The author stated that the 1968 FHA

> was written without enforcement teeth. Moreover, severe statutory and judicial limits on damages and attorney's fees discouraged private utilization, and there existed no significant public enforcement to fill the void.

[Footnotes omitted.]

[151] *See* note 80 of this chapter and corresponding text, *supra*.

[152] H.R. Rep. No. 865, 96th Cong., 2d Sess. 4 (1980).

a. Administrative enforcement

Under the amended Act, an aggrieved party may file an administrative complaint with HUD within one year of the alleged discriminatory conduct.[153] The Secretary of HUD may also file a complaint on his or her own initiative.[154] If the complainant alleges a discriminatory housing practice within the jurisdiction of a state or local public agency that operates under a fair housing law that HUD has certified as being the "substantial equivalent" of the FHA, HUD must refer the complaint to the applicable state or local agency for proceedings in accordance with state law.[155] HUD may take no further action without the consent of such certified agency[156] unless the certified agency fails to institute proceedings within 30 days[157] or fails to carry forward proceedings with reasonable promptness,[158] or unless the Secretary of HUD determines that the certified agency no longer qualifies for certification.[159] If that agency does not institute proceedings (or if there is no certified agency), HUD must administratively proceed with the complaint.[160]

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[153] 42 U.S.C.A. §3610(a)(1)(A)(i) (West Supp. 1990). The limitations period under the 1968 Act was only 180 days.

[154] *Id.*

[155] 42 U.S.C.A. §3610(f) (West Supp. 1990).

[156] Section 3610(f)(3)(A) (West Supp. 1990) provides:

> The secretary may certify an agency under this subsection only if the Secretary determines that —
>
> (i) the substantive rights protected by such agency in the jurisdiction with respect to which certification is to be made;
>
> (ii) the procedures followed by such agency;
>
> (iii) the remedies available to such agency; and
>
> (iv) the availability of judicial review of such agency's action;
>
> are substantially equivalent to those created by and under this subchapter.

In 1988, 38 states and 84 units of local government had been certified as having fair housing laws substantially equivalent to the FHA. *See* 53 *Fed. Reg.* 45019-20 (1988). These state and local laws were not examined for compliance with the handicap provisions of the 1988 Amendments to the FHA. As stated in the *Federal Register*:

> It is made clear that certification . . . does not permit referral of complaints alleging discrimination based on "familial status" or "handicap." Since these are new protected classes, HUD has not analyzed the laws of these jurisdictions to determine whether "on its face" the law of any jurisdictions protects those classes in a manner equivalent to the protection provided by the Act.

53 *Fed. Reg.* at 45020 (1988).

[157] 42 U.S.C.A. §3610(f)(2)(A) (West Supp. 1990).

[158] 42 U.S.C.A. §3610(f)(2)(B) (West Supp. 1990).

[159] 42 U.S.C.A. §3610(f)(2)(C) (West Supp. 1990).

[160] *See, e.g.*, 42 U.S.C.A. §3610(a)(1)(A)(i) (West Supp. 1990).

HUD is required to complete an investigation of the alleged discriminatory housing practice within 100 days[161] and make a determination as to whether "reasonable cause exists to believe that a discriminatory housing practice has occurred, or is about to occur, unless it is impracticable to do so, or unless the Secretary has approved a conciliation agreement with respect to the complaint."[162] At this point HUD will either dismiss the complaint or file a charge.[163] When conducting its investigation, HUD has authority to issue subpoenas and pay witness fees.[164] Any person who fails to comply with a HUD subpoena, falsifies documents, or destroys evidence is subject to a fine up to $100,000 or up to one year of imprisonment.[165]

When HUD files a charge, the aggrieved person, the respondent or HUD has 20 days to elect to have the matter resolved in federal court (to preserve the right to a jury trial).[166] If no election is made, the matter will be heard at an administrative hearing during which the parties have the rights to be represented by counsel, to present evidence and cross-examine witnesses and to issue subpoenas.[167] If the matter is heard in an administrative hearing, the Administrative Law Judge (ALJ) has the power to award actual damages and/or equitable relief (such as injunctive relief), to award attorneys' fees to the prevailing party, and to assess civil penalties against the violators.[168] The ALJ's decision may be reviewed by the Secretary of HUD within 30 days, and judicial review may be sought within 30 days after the final order of the ALJ is entered,[169] regardless of whether the plaintiff has filed a complaint with HUD.[170]

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[161] 42 U.S.C.A. §3610(a)(1)(B)(iv) (West Supp. 1990).

[162] 42 U.S.C.A. §3610(g)(1) (West Supp. 1990).

[163] 42 U.S.C.A. §§3610(g)(2)(A) and (3) (West Supp. 1990). If the aggrieved party has commenced a civil action under state or federal law and trial of that action has begun, however, HUD may not file a charge. 42 U.S.C.A. §3610(g)(4) (West Supp. 1990).

[164] 42 U.S.C.A. §§3611(a) and (b) (1977 and West Supp. 1990).

[165] 42 U.S.C.A. §3611(c) (1977 and West Supp. 1990).

[166] 42 U.S.C.A. §3612(a) (1977 and West Supp. 1990). The right to jury trial, of course, only applies if damages are sought; not when the plaintiff seeks only equitable (injunctive) relief.

[167] 42 U.S.C.A. §§3612(b) and (c) (1977 and West Supp. 1990).

[168] 42 U.S.C.A. §§3612(g)(3) and (p) (West Supp. 1990).

[169] 42 U.S.C.A. §§3612(h) and (i) (West Supp. 1990). *See also*, 28 U.S.C. §2342(6) (West Supp. 1990), which grants jurisdiction for such review to be federal courts of appeals—except the U.S. Court of Appeals for the Federal Circuit.

[170] 42 U.S.C.A. §3613(a)(2) (West Supp. 1990).

b. Private enforcement

An aggrieved party may also sue directly in federal court within two years of the allegedly discriminatory action, without exhausting administrative remedies.[171] The two-year limitations period does not include the time during which HUD administrative proceedings were pending.[172] But an aggrieved party is barred from filing an action under this section if he or she has consented to a conciliation agreement,[173] or if an ALJ has commenced a hearing on the record with respect to the same or a similar charge.[174] If the defendant is found to have violated the Act, the court may award actual and punitive damages, as well as equitable relief—such as injunctive relief or the ordering of "such affirmative action as may be appropriate."[175] In addition, the court may award the prevailing party (other than the United States) reasonable attorneys' fees and costs.[176] Further, the Act provides that "[t]he United States shall be liable for such fees and costs to the same extent as a private person."[177]

The 1988 Amendments greatly expanded the relief available to private plaintiffs. Under the 1968 Act, for example, the limitations period was 180 days, rather than the current two years.[178] Under the 1968 Act punitive damages were limited to $1,000,[179] instead of the unlimited punitive damages currently available. In addition, under the 1968 Act attorneys' fees were only available to a prevailing plaintiff who "in the opinion of the court is not financially able to assume said attorneys' fees";[180] the amended Act has removed this financial restriction.

c. Pattern and practice litigation

The United States Attorney General may also file suit under the FHA when he or she "has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by [the Act]. . . ."[181] Such an action must be filed, however, within "18 months after the date of the occurrence or the termination of the alleged discriminatory housing practice."[182] A person aggrieved by such an alleged discriminatory practice may apply to intervene in the civil action.[183] In addition, the Attorney General may file suit for breach of any conciliation agreement entered into pursuant to the Act within 90 days of the alleged breach.[184] If the Attorney General's suit is successful, the court may award injunctive relief and monetary damages to the aggrieved party. Further, to vindicate the public interest, the court may assess civil penalties against the violator up to $50,000 for a first violation and up to $100,000 for any subsequent violation.[185] The court may also award the prevailing party—other than the United States—attorneys' fees and costs to the same extent that such fees and costs could be awarded in a private civil action.[186]

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[171] 42 U.S.C.A. §3613(a)(1)(A) (West Supp. 1990).

[172] 42 U.S.C.A. §3613(a)(1)(B) (West Supp. 1990).

[173] 42 U.S.C.A. §3613(a)(2) (West Supp. 1990).

[174] 42 U.S.C.A. §3613(a)(3) (West Supp. 1990).

[175] 42 U.S.C.A. §3613(c)(1) (West Supp. 1990). The relief granted, however, may not "affect any contract, sale, encumbrance, or lease consummated before the granting of such relief and involving a bona fide purchaser, encumbrancer, or tenant" who was not provided actual notice of the filing of either an administrative complaint or a civil action under the FHA prior to consummating the transaction. 42 U.S.C.A. §3613(d) (West Supp. 1990).

[176] 42 U.S.C.A. §3613(c)(2) (West Supp. 1990).

[177] *Id.*

[178] *See* 42 U.S.C.A. §3612 (1977 and West Supp. 1990).

[179] *See* 42 U.S.C.A. §3612(c) (1977 and West Supp. 1990).

[180] *Id.*

B. Section 504 and Housing

In some situations handicapped plaintiffs may assert claims under Section 504 based on discriminatory housing practices. Several courts have held that Section 504 precludes a recipient of federal financial assistance from discriminating against handicapped individuals with respect to the provision of housing.

In *Majors v. Housing Authority of County of DeKalb*,[187] for example, the plaintiff was a mentally disabled adult whose doctor and social workers testified that she had a psychological and emotional dependence on her pet dog. She was provided housing by the county housing authority, but was informed that no pets were allowed in the housing units. When the plaintiff insisted on keeping the dog in the apartment, she was served with a termination notice. The plaintiff filed a suit claiming discrimination on the basis of handicap in violation of Section 504. The district court held that the plaintiff was not otherwise qualified for the housing because she was unable to comply with the lease provision prohibiting animals. On appeal, the Fifth Circuit reversed. The Fifth Circuit stated:

> The holding in *Southeastern Community College*, which the court below and the Housing Authority rely upon that one must consider the necessary limitations imposed by the handicap itself in determining whether an indivi-

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[181] 42 U.S.C.A. §3614(a) (West Supp. 1990).

[182] 42 U.S.C.A. §3614(b)(1)(B) (West Supp. 1990).

[183] 42 U.S.C.A. §3614(e) (West Supp. 1990).

[184] 42 U.S.C.A. §3614(b)(2)(A) and (B) (West Supp. 1990).

[185] 42 U.S.C.A. §3614(d)(1) (West Supp. 1990).

[186] 42 U.S.C.A. §3614(d)(2) (West Supp. 1990).

[187] 652 F.2d 454 (5th Cir. 1981).

> dual is "otherwise qualified" must be considered in the context of whether reasonable accommodations will permit the handicapped person to realize the principal benefits of the program.[188]

Thus, the Circuit Court held that the ultimate issue to be resolved by the trial court was whether reasonable accommodations could be provided to allow the plaintiff to enjoy the full benefit of the housing program. The Fifth Circuit remanded the case to the district court for a determination of that question.[189]

And, in *Schuett Investment Co. v. Anderson*[190] a tenant in a federally subsidized housing program was unable to lift heavy weights due to a back injury. The landlord terminated Anderson's lease because she failed to remedy certain fire code violations by removing boxes from specified areas of the apartment building. Anderson claimed that the landlord was required to accommodate her disability by either providing assistance to correct the fire code violations or allowing the plaintiff more time to do so. The court held that the landlord violated Section 504, stating that "[t]he lease violation in this case is causally related to Anderson's handicap. [The landlord's] accommodation of Anderson's handicap would have insured Anderson's continued enjoyment of federally subsidized housing."[191]

Similarly, in *Bolthouse v. Continental Wingate Co.*[192] two handicapped plaintiffs—one suffering from schizophrenia and the other from cerebral palsy—alleged that they were denied federally subsidized apartments solely because of their handicaps. After finding the defendants' purported reasons for rejecting the plaintiffs to be merely pretextual, the court found the defendants in violation of Section 504 and granted a preliminary injunction ordering the defendants to provide the plaintiffs with the first apartments to become available.

A plaintiff may not utilize Section 504 to circumvent the requirements of other federal statutes relating to the provision of federally subsidized housing, however. A case on point is *Brecker v. Queens B'nai B'rith Housing Development Fund Co.*[193] In that case, the plaintiffs claimed to fall within the class of individuals eligible to participate in federally funded housing programs pursuant to Section 202 of the Housing Act of 1959,[194] which authorizes programs providing for subsidized housing for elderly and handicapped persons. The defendants in

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[188] 652 F.2d at 457.

[189] *See also, Whittier Terrace Associates v. Hampshire*, 26 Mass. App. Ct. 1020, 532 N.E.2d 712 (Mass. App. 1989) (eviction from low-income housing of mentally ill tenant with psychological dependence on her cat due to prohibition against cats violated Section 504; the plaintiff could be reasonably accommodated since the cat presented no problems at the housing project).

[190] 386 N.W.2d 249 (Minn. App. 1986).

[191] 386 N.W.2d at 253.

[192] 656 F. Supp. 620 (W.D. Mich. 1987).

[193] 607 F. Supp. 428 (E.D.N.Y. 1985), *aff'd*, 798 F.2d 52 (2d Cir. 1986).

[194] 12 U.S.C.A. §1701(q) (1989 and West Supp. 1990).

Brecker established criteria admitting only elderly and mobility-impaired persons to their Section 202 housing project. The plaintiffs alleged that the defendants violated Section 504 by excluding all non-mobility-impaired handicapped persons as eligible tenants of a Section 202 housing project. The plaintiffs claimed that they were eligible for Section 202 housing because they were developmentally disabled. The district court, however, noted that Section 202 programs provide housing for four types of persons with disabilities, and each sponsor of a Section 202 project is approved by the U.S. Department of Housing and Urban Development to serve any one or more particular group(s) of those persons eligible for Section 202 funds. Thus, the court held as follows:

(1) The plaintiffs were not otherwise qualified for the defendants' program because they were neither elderly nor mobility impaired.

(2) The plaintiffs' argument that Section 504 requires that they be admitted into a Section 202 project merely because they belonged to one of Section 202's four covered groups "ignores the express language of Section 202 which permits sponsorship of only one of the four groups covered."[195] Moreover, acceptance of the plaintiffs' argument would be contrary to the rule that a general statute (Section 504) cannot be construed to repeal or revoke another more particular statute (Section 202).

(3) If Section 202 housing sponsors were required to "accept members from all classes covered by the statute regardless of which class or classes the sponsors had originally intended to serve," that result "would be clearly contrary to case law holding that Section 504 may not be used to expand the delivery of benefits awarded under another statute if that statute otherwise restricts the delivery of benefits."[196]

(4) Requiring a sponsor of a Section 202 housing project to accept all permissible categories of people rather than just the one or two categories of people they contracted to serve would constitute affirmative action outside the scope of Section 504.

The Second Circuit affirmed the district court's ruling in *Brecker* as to the plaintiffs' Section 504 claim "for the reasons set forth in the district court's opinion. . . ."[197] Several other courts have reached the same result.[198]

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[195] 607 F. Supp. at 436.

[196] *Id.*

[197] 798 F.2d at 57.

[198] *See, e.g., Knutzen v. Eben Ezer Lutheran Housing Center,* 815 F.2d 1343 (10th Cir. 1987) (mentally impaired and developmentally disabled plaintiffs could not prevail in an action under Section 504 alleging that the defendants were required to admit them to their Section 202 housing program); *Almonte v. Pierce,* 666 F. Supp. 517, 530 (S.D.N.Y. 1987) (no claim arose under Section 504 with respect to the allegation that a subclass of "physically handicapped" people could not be subdivided into "mobility impaired" people for purposes of obtaining Section 202 housing); *Edge v. Pierce,* 540 F. Supp. 1300 (N.D.N.J. 1982) (mentally ill plaintiffs were unlikely to prevail on the merits of their claim that they were otherwise qualified under Section 504 for Section 202 housing).

12

The Americans with Disabilities Act of 1990

I. Introduction

The Americans with Disabilities Act of 1990 (ADA)[1] was signed into law by President Bush on July 26, 1990, after receiving overwhelming support from Congress.[2] As many as twenty-six years after federal law ensured other citizens of this country the right to move freely within our society without confronting discrimination,[3] that right was finally extended to persons with physical and mental disabilities. Thus, the ADA has been termed the "Emancipation Proclamation" for disabled people in America,[4] and its date of enactment "Liberation Day for the Disabled."[5]

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[1] S. 933, 101st Cong., 2d. Sess., 136 *Cong. Rec.* H4582-96 (July 12, 1990). The full text of the ADA can be found in appendix G.

[2] The Act ultimately passed the House by a vote of 377-28 and the Senate by a vote of 91-6. 136 *Cong. Rec.* H4629, S9695 (July 13, 1990).

[3] *See, e.g.*, the Civil Rights Act of 1964, 42 U.S.C.A. §§2000a to a-6, 2000e to e-17 (1981) (prohibiting discrimination in employment and public accommodations on the basis of race, color, creed, national origin or sex). Discrimination in places of public accommodation on the basis of race was prohibited in 1964; discrimination in places of public accommodation on the basis of sex was prohibited in 1972.

[4] *See, e.g.*, A.Z. Horvath, "Disabled-Rights Bill Praised and Feared," *Newsday*, Sept. 9, 1989, at 2 ("Senate lead sponsor Tom Harkins (D-Iowa) called the [ADA] a '20th-century Emancipation Proclamation for people with disabilities' "); G. Elsasser, "Senate Oks Rights Bill for Disabled," *Chicago Tribune*, Sept. 8, 1989, §1, at 1 (the ADA "is 'a 20th-century Emancipation Proclamation for people with disabilities,' said Sen. Tom Harkin (D-Iowa), the bill's chief sponsor") (hereinafter Elsasser).

[5] S. Chapman, "Waving a Magic Wand at the Needs of the Handicapped," *Chicago Tribune*, Sept. 24, 1989, §4, at 3 (the ADA "has been dubbed 'Liberation Day for the disabled' ") (hereinafter "Waving a Magic Wand").

The 43 million Americans with disabilities[6] had long awaited this historic moment. Prior to passage of the ADA, the majority of employers, program administrators, owners and managers of places of public accommodation and others were free to discriminate at will against disabled people.[7] Thus, as explained in chapter one of this text, Americans with disabilities have not suffered just from commonly recognized forms of discrimination in areas such as employment, education, transportation, housing, and the provision of social services; they have suffered discrimination in *all* walks of life.

The ADA clearly provides that it is no longer permissible to treat disabled persons in such a discriminatory fashion. As stated by Evan Kemp, Jr., then Chairman of the United States Equal Employment Opportunity Commission, the ADA serves as a "policy statement to the world: We are not going to exclude disabled people anymore . . . ."[8] As another commentator opined:

> The ADA is a pronouncement that our society will no longer tolerate lost potential—that we will no longer judge people by their disabilities, but by their abilities—that we will no longer design a society which excludes, but one that includes.[9]

Legislation was necessary to assure the opportunity to attain this goal, since experience has proven the unfortunate fact that "no civil right has ever been secured without legislation."[10] Whether the ADA will succeed in reaching that goal, of course, remains an open question. Disabled people have long recognized that the greatest barriers they confront are not the physical barriers created by their disabilities, but the attitudinal barriers created by the so-called "able-bodied" members of our society.[11] While no legislation can be expected to completely change people's attitudes, it is hoped that the ADA will aid in fostering that change.

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[6] ADA §2(a)(1) (1990), 136 *Cong. Rec.* H4582 (July 12, 1990).

[7] Prior to the enactment of the ADA, some forms of discrimination against handicapped persons were prohibited by the Rehabilitation Act of 1973, 29 U.S.C.A. §§501-505 (1985 and West Supp. 1990). As addressed in previous chapters of this text, Section 501 of the Act prohibits federal employers from discriminating against handicapped persons; Section 503 prohibits employers having contracts with the federal government in excess of $2,500 from discriminating against handicapped persons; and Section 504 prohibits recipients of federal financial assistance from discriminating against handicapped persons. None of these laws, however, prohibit the *private* sector from discriminating against handicapped persons. Further, while most states have laws that prevent some forms of discrimination against handicapped persons, these laws vary substantially in scope and effect, and in many — or most — cases merely provide minimal relief.

[8] E.T. Hearn, "No Easy Ride for Disabled," *Chicago Tribune*, Oct. 8, 1989, §7, at 1.

[9] Joint Hearing on H.R. 2273, The Americans with Disabilities Act of 1989: Joint Hearing of the Comm. on Education and Labor, Subcomm. on Select Education and Employment Opportunities, 101st Cong., 1st Sess. 51 (1989) (Statement of Joseph L. Rauh, Jr., Counsel to the Leadership Conference on Civil Rights).

[10] James S. Brady, "Save Money: Help the Disabled," *The New York Times*, August 29, 1989, §A, at 19.

At the onset it should be explained that the ADA follows Sections 501, 503 and 504 of the Rehabilitation Act[12] in defining the term "disabled" individual. A disabled (or handicapped) individual[13] under both the ADA and the Rehabilitation Act is one who has a physical or mental impairment that substantially limits one or more of that individual's major life activities, has a record of such an impairment, or is regarded as having such an impairment—even if he or she does not, in fact, have such an impairment (such as a cured cancer victim or an individual disfigured by burns).[14] There has been substantial litigation under Section 504 with respect to this definition, particularly concerning the following questions: (1) What is a "major life activity?" (2) What constitutes a "substantial impairment" of such a major life activity? (3) What constitutes a "physical" or "mental" impairment? (4) What is meant by the term "regarded as" having a physical or mental impairment?[15] The Section 504 case law on these issues will be applicable to cases arising under the ADA.

Courts interpreting Section 504 have held that the term "handicapped" individual under that section includes transsexuals[16] and compulsive gamblers.[17] To ensure that such individuals—and others—are not covered under the ADA, however, Congress provided that the term "disability" as used in the ADA does not include homosexuality or bisexuality, transvestism, transsexualism or other sexual orientations or disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current use of illegal drugs.[18]

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[11] One commentator has stated that "only the young and idealistic believe passage of the ADA will prompt change." [N. Widman, "Iowa's Disabled Fight Job Discrimination," 85 *Business Record*, (No. 37) Sept. 11, 1989, §1, at 2 (quoting Mario G. Barillas, coordinator of planning at the Des Moines, Iowa Division of Vocational Rehabilitation Services).] In the words of that commentator, the ADA is "necessary legislation, the timing is right, but I wouldn't hold my breath waiting for any real changes." [*Id.*]

[12] 29 U.S.C.A. §§791, 793 and 794 (1985 and West Supp. 1990). For a comprehensive analysis of Section 504, *see* chapters 3-8 of this text, *supra*; for a comprehensive analysis of Sections 501 and 503, *see* chapter 9 of this text, *supra*.

[13] The Rehabilitation Act utilizes the term "handicapped" rather than "disabled." The two terms are used interchangeably in common practice, however, and are regarded as having the same meaning. *See* note 2 of chapter 1 of this text, *supra*.

[14] ADA §3(2), 136 *Cong. Rec.* H4583 (July 12, 1990); 29 U.S.C.A. §706(8)(A) (West Supp. 1990). *See* chapter 4 of this text, *supra*, for a comprehensive overview of who is a handicapped or disabled person under this definition.

[15] For a discussion of such litigation, *see* chapter 4 of this text, *supra*.

[16] *See, e.g., Blackwell v. United States Department of Treasury*, 639 F. Supp. 289 (D.D.C. 1986).

[17] *See, e.g., Rezza v. United States Department of Justice*, 49 Fair Empl. Prac. Cas. 1369 (E.D. Pa. 1988).

The final version of the ADA represents a series of compromises between advocates for disabled people and the business community. The ADA contains several major titles prohibiting discrimination against qualified individuals with disabilities with respect to employment, public transportation, places of public accommodation and the provision of telecommunication services. This chapter will discuss each of those sections in detail, and, in addition, will present an overview of various miscellaneous chapters of the ADA that are important to a full understanding of the Act's scope and import.

II. Employment Discrimination

The first title of the ADA is intended to open the world of employment to disabled people. As illustrated by a 1989 report from the United States Bureau of the Census and other studies, prior to passage of the ADA only two-thirds of working-age Americans with disabilities who were able to—and wanted to—work were employed, and in the late 1980s disabled people lost ground in their struggle to obtain equal employment opportunities.[19] To remedy this situation, Title I of the ADA provides that employers, employment agencies, labor organizations or joint labor-management committees (collectively called employers in this chapter)[20] may not discriminate against qualified individuals with respect to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[21]

Title I of the ADA becomes effective in July 1992, two years after enactment of the Act.[22] Between July 1992 and July 1994, however, only employers having 25 or more employees are covered by the Act.[23] Thereafter, all employers having 15 or more employees are covered.[24] Despite the broad definition of the term

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[18] ADA §511, 136 *Cong. Rec.* H4596 (July 12, 1990).

[19] *See* text at notes 20-22 of chapter 1 of this text, *supra*.

[20] ADA §101(2), 136 *Cong. Rec.* H4583 (July 12, 1990).

[21] ADA §102(a), 136 *Cong. Rec.* H4583 (July 12, 1990). The term "discriminate" is defined as including, *inter alia*, classification or segregation of applicants or employees in a manner that adversely affects the employment status of a disabled person, participating in contractual arrangements that indirectly discriminate against disabled applicants or employees, or following administrative procedures that have the effect of discriminating—or perpetuating discrimination—against disabled persons. ADA §§102(b)(1)(2) and (3), 136 *Cong. Rec.* H4583 (July 12, 1990).

[22] ADA §108, 136 *Cong. Rec.* H4585 (July 12, 1990).

[23] ADA §101(5), 136 *Cong. Rec.* H4583 (July 12, 1990).

[24] *Id.*

"employer," religious organizations are not precluded under the Act from giving preference in hiring decisions to members of their own religion or from requiring that all employees be members of that religion.[25] Further, the term "employer" does not include the United States or a private membership club that is exempt from ordinary tax rules.[26]

The ADA's mandate against employment discrimination is far reaching. Indeed, Title I prohibits employers from entering into contracts with other parties or entities that would have the effect of discriminating against disabled people.[27] Thus an employer could not escape the requirement that its business premises be accessible to disabled persons, for example, by entering into a lease to rent non-accessible premises. Similarly, Title I's prohibition against the adoption of administrative procedures that have a discriminatory effect against disabled persons[28] prohibits an employer from refusing to hire a disabled person because the employer's insurance does not cover accidents or injuries to disabled people.[29] Title I prohibits employment actions that have a discriminatory *effect* on disabled persons even when the employer has no *intent* to discriminate.[30]

In addition to prohibiting employment discrimination against people with actual or perceived disabilities, Title I prohibits discrimination in employment against *associates* of disabled individuals.[31] Thus, for example, an employer may not discriminate against a non-disabled individual who lives with someone with AIDS, or who has a disabled family member that the employer fears will cause the non-disabled applicant or employee to incur excessive absences from work.

Title I of the ADA incorporates many of the standards set forth under Section 504 of the Rehabilitation Act.[32] Thus, Title I, like Section 504, provides that employers must make "reasonable accommodations"[33] for "otherwise qualified[34] disabled individuals.[35] Suggested "reasonable accommodations" under the ADA, as under Section 504, include (but are *not* limited to): (1) making existing facilities readily accessible to and usable by people with disabilities; (2) job restructuring; (3) development of part-time or modified work schedules; (4) reassignment to a vacant position; (5) acquisition or modification of equipment or devices; (6) modification or adjustment of examinations, training materials or policies; and (7) the provision of qualified readers or interpreters for blind or deaf employees.[36]

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[25] ADA §103(c), 136 *Cong. Rec.* H4584 (July 12, 1990).

[26] ADA §101(5)(B), 136 *Cong. Rec.* H4583 (July 12, 1990).

[27] ADA §102(b)(2), 136 *Cong. Rec.* H4583 (July 12, 1990).

[28] ADA §102(b)(3), 136 *Cong. Rec.* H4583 (July 12, 1990).

[29] Americans with Disabilities Act of 1990, H. Rep. No. 101-485, part 3, 101st Cong., 2d Sess. 38 (1990) (hereinafter H. Rep. No. 485, part 3).

[30] *See, e.g.*,ADA §102(b)(3)(A), 136 *Cong. Rec.* H4583 (July 12, 1990). *See, also*, Americans with Disabilities Act of 1990, H. Rep. No. 101-485, part 2, 101st Cong., 2d Sess. 61 (1990) (hereinafter H. Rep. No. 485, part 2). Cases involving discriminatory effects are known as "disparate impact" cases—to be distinguished from "disparate treatment" cases, in which discriminatory intent is at issue. The ADA prohibits both types of discrimination in the employment context.

[31] ADA §102(4), 136 *Cong. Rec.* H4583 (July 12, 1990). This section prohibits "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." The burden lies with the individual claiming discrimination to prove that the employer's allegedly discriminatory conduct was motivated by that individual's relationship or association with a disabled person. H. Rep. No. 485, part 3, *supra* note 29, at 38.

[32] 29 U.S.C.A. §794 (1985 and West Supp. 1990).

An accommodation is *not* reasonable under the ADA if it would impose an "undue hardship" on the employer's business.[37] The term "undue hardship" is defined as "an action requiring significant difficulty or expense."[38] Factors to be considered when determining whether an accommodation would constitute an undue hardship under the ADA are generally the same factors to be considered when making that determination under Section 504: the size, type and budget of the employer's program and the nature and cost of the accommodation at issue.[39]

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[33] ADA §§102(5)(A) and (B), 136 *Cong. Rec.* H4583 (July 12, 1990). For similar standards under Section 504, *see, e.g.*, 45 C.F.R. §84.12(a) (1989) (regulations promulgated by the Department of Health and Human Services (DHHS); 29 C.F.R. §32.3 (1989) (regulations promulgated by the Department of Labor (DOL); 28 C.F.R. §41.53 (1989) (regulations promulgated by the Department of Justice (DOJ).

[34] *Id.* For similar standards under Section 504, *see, e.g.*, 45 C.F.R. §84.12(a) (1989) (DHHS regulation), and 28 C.F.R. §41.53 (1989) (DOJ regulation).

[35] For a comprehensive analysis of the "otherwise qualified" and "reasonable accommodation" factors, as those factors have evolved under Section 504, *see* chapter 5 of this text, *supra*.

[36] ADA §101(9), 136 *Cong. Rec.* H4583 (July 12, 1990). For similar suggestions under Section 504 *see, e.g.*, 45 C.F.R. §84.12(b) (1989) (DHHS regulation); 29 C.F.R. §32.3 (1989) (DOL regulation). Note, however, that the responsibility lies with the disabled employee or applicant to request a reasonable accommodation; "the employer is not liable for failing to provide an accommodation if it was not requested." H. Rep. No. 485, part 3, *supra* note 29, at 39.

In one respect the Section 504 and ADA specifications relating to reasonable accommodations may differ. Courts have held that Section 501 (and, by analogy, Section 504) does not require federal employers to make accommodations for disabled employees that would contravene the provisions of an otherwise applicable collective bargaining agreement. [See section I(D)(4) of chapter 9 of this text, *supra*, for a discussion of this issue.] Congress has stated, however, that a collective bargaining agreement will not serve as a defense to an employer who fails to accommodate a disabled employee as required by the ADA. *See*, Americans with Disabilities Act of 1989, S. Rep. No. 116, 101st Cong., 1st Sess. 32 (1989).

[37] ADA §102(5)(A), 136 *Cong. Rec.* H4583 (July 12, 1990). For similar standards under Section 504, *see, e.g.*, 45 C.F.R. §84.12(a) (DHHS regulation); 29 C.F.R. §32.3 (DOL regulation); 28 C.F.R. §41.53 (DOJ regulation).

[38] ADA §101(10)(A), 136 *Cong. Rec.* H4583 (July 12, 1990).

[39] ADA §101(10)(B), 136 *Cong. Rec.* H4583 (July 12, 1990). The factors listed under the ADA are somewhat more comprehensive than the factors listed under Section 504, however. The DHHS Section 504 regulations, for example, simply provide that the factors to be considered when determining

Significantly, under the ADA the "burden is on the employer to demonstrate that the needed accommodation would cause an undue hardship," rather than on the disabled employee or applicant to prove the converse.[40]

The "undue hardship" standard represents one of the Act's areas of compromise. The original version of the ADA required employers to provide reasonable accommodations for disabled employees unless such accommodations would "threaten the existence of the [employer's] business."[41] Proponents of the business sector termed that requirement the "bankruptcy provision";[42] it was subsequently altered in the spirit of compromise.

Title I of the ADA, like Section 504, defines a "qualified individual with a disability" as one "who, with or without reasonable accommodation, can perform the essential functions" of the job in question.[43] Title I further provides, however, that

> consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.[44]

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whether an accommodation would impose an undue hardship to a covered entity under Section 504 include:

(1) The overall size of the recipient's program with respect to the number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

45 C.F.R. §84.12(c)(1989). The ADA, however, provides that the factors to be considered when determining whether provision of an accommodation would constitute an undue hardship to an employer include:

(i) the nature and cost of the accommodation needed under this Act;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

ADA §101(10)(B), 136 *Cong. Rec.* H4583 (July 12, 1990).

[40] H. Rep. No. 485, part 3, *supra* note 29, at 42.

[41] *See, e.g.*, Hearings Before the Senate Committee on Labor and Human Resources and the Subcommittee on the Handicapped, 100th Cong., 1st Sess. 90 (May 9, 10, and 16 and June 22, 1989), (hereinafter Senate Hearings May and June 1989).

[42] *Id.*

[43] ADA §101(8), 136 *Cong. Rec.* H4583 (July 12, 1990). The term "essential function" means "job tasks that are fundamental and not marginal." H. Rep. No. 485, part 2, *supra* note 30, at 55.

[44] *Id.* A similar provision is not incorporated into the regulations promulgated under Section 504. [For a discussion of the difficulties faced by the courts when interpreting the term "essential functions"

Title I of the ADA also follows Section 504 in providing employers with a "safety" defense. Thus, the Act provides that a disabled individual is not qualified for a job if he or she poses a *direct threat* to the health or safety of other individuals in the workplace.[45] The ADA requires the Secretary of Health and Human Services, no later than six months after the enactment of the Act, to

> (A) review all infectious and communicable diseases which may be transmitted through handling the food supply;
> (B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;
> (C) publish the methods by which such diseases are transmitted; and
> (D) widely disseminate such information regarding the list of diseases and their modes of transmissibility to the general public.
>
> Such list shall be updated annually.[46]

If an individual has an infectious or communicable disease that can be transmitted through the handling of food—*as included on the DHHS list*, and the risk of transmission cannot be eliminated by the provision of reasonable accommodation(s), the Act provides that "a covered entity may refuse to assign or continue to assign such individual to a job involving food handling."[47] Prior to the final passage of the ADA, an amendment was added to the Act that would have permitted employers to discriminate at will against persons with an infectious disease (such as AIDS) with respect to jobs involving the handling of foods.[48] After much controversy, that amendment was deleted from the final version. The ADA is premised on the philosophy that absent an *actual* (rather than imagined) threat, an employer cannot refuse to hire a disabled person based on fears relating to safety.[49] For example, an individual with AIDS, which the medical profession (and the DHHS) states is not transmitted by casual contact, will generally not fall

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under Section 504, *see* Section III (A) of chapter 5 of this text, *supra*.] Note, however, that a proposed amendment that would have created a presumption in favor of the employer's definition of the essential functions of a job was rejected by Congress. *See, e.g.*, H. Rep. No. 485, part 3, *supra* note 29, at 33.

[45] ADA §103(b), 136 *Cong. Rec.* H4584 (July 12, 1990) (emphasis added). The term "direct threat" is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." ADA §101(3), 136 *Cong. Rec.* H4583 (July 12, 1990). For a discussion of the safety defense under Section 504, *see* section III(B) of chapter 5 of this text, *supra*.

[46] ADA §103(d)(1), 136 *Cong. Rec.* H4584 (July 12, 1990).

[47] ADA §103(d)(2), 136 *Cong. Rec.* H4584 (July 12, 1990).

[48] *See* the House insertions to S. 933, §103(d), 136 *Cong. Rec.* H2641 (May 22, 1990).

[49] The Joint Explanatory Statement of the Committee of Conference explains that the provisions allowing employers to preclude only those persons having infectious diseases contained on a list to be compiled by the Secretary of DHHS from working at jobs involving the handling of food carry out

> both the letter and the spirit of the underlying requirements of the ADA. Instead of allowing false perceptions to determine whether an employee may remain in a particular

within the safety exception to the ADA and will, therefore, be protected from employment discrimination under the ADA—even with respect to food-handling jobs.

Title I of the Act provides that the term "qualified individual with a disability" shall not include a current user of illegal drugs, when the employer acts on the basis of such use.[50] The Act makes it clear, however, that rehabilitated drug users *are* protected from employment discrimination under the ADA,[51] as they are under Section 504,[52] although it allows employers to adopt policies, including drug testing, to ensure that an employee is no longer using illegal drugs.[53] The ADA expressly permits employers to prohibit the use of alcohol or illegal drugs in the workplace and to hold an employee who is a drug user or alcoholic to the same standards as required of nonalcoholics or non-drug-users.[54]

> job, this provision ensures that valid public health guidelines, rather than false perceptions, will determine the protections afforded under this title. In addition, and of critical importance, this provision should reassure the American public by requiring the Secretary to evaluate this area carefully by reviewing all communicable diseases and by publishing a list of diseases that are transmitted through food handling and by ensuring that the American public will be educated regarding those diseases which are transmitted through the handling of food.

136 *Cong. Rec.* H4598 (July 12, 1990).

[50] ADA §104(a), 136 *Cong. Rec.* H4584 (July 12, 1990).

[51] ADA §104(b), 136 *Cong. Rec.* H4584 (July 12, 1990). That section provides as follows:

> RULES OF CONSTRUCTION.—Nothing in subsection (a) shall be construed to exclude as a qualified individual with a disability an individual who—(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or (3) is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

[52] For a discussion of the manner in which Section 504 protects drug abusers and alcoholics, *see* section VI of chapter 4 of this text, *supra.*

[53] ADA §104(d), 136 *Cong. Rec.* H4584 (July 12, 1990). This section provides that "a test to determine the illegal use of drugs shall not be considered a [discriminatory] medical examination." It further provides, however, that the Act shall not be "construed to encourage, prohibit, or authorize the conducting of drug testing. . . ." Similarly, section 104(e) of the Act provides that the Act shall not be "construed to encourage, prohibit, restrict, or authorize. . ." the Department of Transportation to test employees or applicants for illegal drug or alcohol use and to remove persons who test positive to such tests from employment.

[54] ADA §104(c), 136 *Cong. Rec.* H4584 (July 12, 1990). This section provides that employers covered under the Act:

> (1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

To ensure that misconceptions do not bias the employee merit selection process, the ADA, like Section 504, provides that employers may not utilize employment tests or criteria that tend to screen out disabled people unless such criteria are shown to be job-related and consistent with business necessity; employers must also select and administer employment tests in such a manner as to ensure that such tests accurately reflect the skill or aptitude of the applicant or employee, rather than reflecting any impaired sensory, manual or speaking skills of the applicant or employee.[55] Employers may not conduct medical examinations or make inquiries of a job applicant or employee regarding whether such individual has a disability, but employers *may* make pre-employment inquiries into the ability of an applicant to perform job-related functions.[56] In addition, an employer may require a disabled employee to submit to a medical examination after he or she has been employed, and may condition an offer of employment on the results of such a medical examination when *all* entering employees, regardless of disability, are subjected to such an examination.[57] Information about the medical history or condition of the applicant or employee must be kept in separate medical files and treated as confidential, however, and may only be used in the following circumstances:

> (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
>
> (ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
>
> (iii) government officials requesting compliance with this Act shall be provided relevant information on request.[58]

> (2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;
>
> (3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. §701 *et seq.*);
>
> (4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and [may require that applicable employees comply with standards relating to alcohol and drug use established by the Department of Defense, the Nuclear Regulatory Commission and the Department of Transportation].

[55] ADA §§102(b)(6) and (7), 103(a), 136 *Cong. Rec.* H4583-84 (July 12, 1990). For similar provisions under Section 504, *see, e.g.*, 29 C.F.R. §§32.14 (a) and (b) (1989) (DOL regulation); 45 C.F.R. §§84.13 (a) and (b) (1989) (DHHS regulation). For a discussion of such provisions under Section 504, *see* section III (A) of chapter 6 of this text, *supra*.

[56] ADA §§102(c)(3) and (4), 136 *Cong. Rec.* H4583 (July 12, 1990). For similar provisions under Section 504, *see, e.g.*, 29 C.F.R. §32.15 (a) (1989) (DOL regulation) and 45 C.F.R. §84.14 (a) (1989) (DHHS regulation). For a discussion of pre-employment inquiries under Section 504, see section III (B) of chapter 6 of this text, *supra*.

[57] ADA §102(c)(3), 136 *Cong. Rec.* H4583 (July 12, 1990).

[58] ADA §102(c)(3) (B) and (C), 136 *Cong. Rec.* H4583 (July 12, 1990).

The United States Equal Employment Opportunity Commission (EEOC) is responsible for overseeing and enforcing the employment discrimination provisions of the ADA.[59] The EEOC is required to issue regulations to carry out Title I within one year of the ADA's enactment.[60] In addition, the EEOC is obligated to work in conjunction with the Offices for Civil Rights of all agencies having enforcement authority under the Rehabilitation Act of 1973 (primarily Section 504) to ensure that administrative complaints filed under both Acts are "dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements . . . [under the two Acts]."[61]

Title I of the Act provides that the powers, remedies and procedures set forth in Sections 705, 706, 707, 709 and 710 of the Civil Rights Act of 1964[62] are available to the EEOC, to the Attorney General, and to "any person alleging discrimination" in violation of the employment provisions of the ADA or regulations promulgated thereunder.[63] Thus the Act contemplates both administrative and individual enforcement of the employment provisions. Moreover, it is intended that disabled people will be privy to the same remedies that are available to other minority groups—such as women and members of racial minorities—to redress instances of employment discrimination.[64]

Prior to enactment of the ADA, the employment provisions of the Act were criticized by various commentators as opening the door to a never-ending stream of litigation over the vagaries of such terms as "reasonable accommodations," "otherwise qualified," "essential functions," and "undue hardship." The Act was called "a lawyer's dream" that "would create thousands of court cases."[65] Critics contended that while the Civil Rights Act of 1964 focuses on consideration and cooperation, the ADA "encourages adversarial relations, with direct resort to civil litigation the preferred approach."[66] Indeed, the *Wall Street Journal* went so far as to call the ADA the "Lawyer's Employment Act."[67] While those comments appear extreme, it is clear that litigation will ensue as a result of the Act's passage, just as it has arisen under all civil rights laws. Case law relating to Section 504 will prove very helpful in resolving issues arising under the ADA, and should lessen the need for excessive litigation since the two Acts contain many of the same requirements and use many of the same terms. Moreover, as Congress obviously recognized, the fact that litigation might result did not provide sufficient reason for denying passage of a law that was desperately needed to relieve the plight of 43 million Americans.

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[59] ADA §101(1), 106, 136 *Cong. Rec.* H4583, H4585 (July 12, 1990).

[60] ADA §106, 136 *Cong. Rec.* H4584 (July 12, 1990).

[61] ADA §107, 136 *Cong. Rec.* H4585 (July 12, 1990).

[62] 42 U.S.C.A. §§2000e-4, 2000e-5, 2000e-6, 2000e-8 and 2000e-9 (1981).

[63] ADA §107(a), 136 *Cong. Rec.* H4585 (July 12, 1990).

[64] As this book went to press, Congress had just passed the Civil Rights Act of 1990, H.R. 4000, 101st Cong., 2d Sess., S. 2104, 101st Cong., 2d Sess. (1990). That Act would greatly expand the remedies available for employment discrimination in violation of the currently existing civil rights laws. If enacted as proposed, the Act would allow individual victims of employment discrimination—as defined by all currently existing civil rights laws—to recover compensatory and punitive damages for intentional discrimination. During congressional discussions about the ADA, several amendments were proposed that would have excluded disabled people—as covered under the ADA—from the benefits of the Civil Rights Act of 1990 (if enacted). Congress refused to adopt the proposed amendments, on the ground that disabled people should be entitled to the same rights and the same remedies for discrimination as those provided to members of other minorities. If compensatory and punitive damages are made available for race, gender, and age discrimination, Congress felt that such remedies should be available for discrimination on the basis of disability. *See, e.g.*, 136 *Cong. Rec.* H2611-2623 (May 22, 1990) (Senate discussion, vote, and rejection of the Sensenbrenner amendment to the ADA). President Bush is expected, however, to veto the Act.

Critics also contended that the ADA, particularly the Act's employment provisions, would impose unfair and unwarranted costs upon the private sector. Congress was accused of enacting the ADA to impose an "invisible tax" on businesses.[68] The same commentator accused Congress of "escaping the budget pinch" by "load[ing] costly burdens on the private sector, to be paid for with private dollars."[69] In the employment context it was remarked that the ADA is a ploy

> which will force employers to spend unknown sums to accommodate handicapped employees and customers. If Congress were forced to pay the costs out of the Treasury, taxpayers would be howling at the potentially crushing load. By putting the burden on employers, Congress can portray the benefits as manna falling miraculously from Capitol Hill.[70]

These comments evidence the very prejudice that necessitated passage of the ADA. As explained in some detail in chapter one of this text, the theory that hiring disabled employees is excessively costly is more myth than fact. Rather than constituting an invisible tax upon businesses, the employment provisions of the ADA are intended to overturn the effects of the stereotypical, prejudicial, and generally unfounded beliefs as to the lack of capabilities of disabled people. The practical effect of the ADA's employment provisions—assuming that they are enforced adequately—will be to enable over eight million disabled workers to enter the work force, thereby removing those individuals from government subsidy rolls and empowering them to become contributing, taxpaying members of society.[71] The overall cost of the law to employers should be minimal, since larger employers have two to four years to devise means of complying with the Act, while small employers will never have to comply.[72]

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[65] Elsasser, *supra* note 4, at 4 (quoting Sen. David Pryor (D. Ark.)).

[66] "What's Wrong with the New Civil Rights Bill," *Washington Post*, September 2, 1989, at A23.

[67] "Review and Outlook," *Wall Street Journal*, September 11, 1989, at A18.

[68] *See, e.g.*, Elsasser, *supra* note 4 at 4; *see also* Chapman, "How Washington Finds Ways to Live Beyond Its Income," *Chicago Tribune*, October 15, 1989, at 3 (hereinafter Chapman).

[69] Chapman, *supra* note 68.

[70] *Id.*

III. Transportation

The transportation provisions of the ADA constitute a major hub of the Act. Access to transportation is viewed as imperative; Congress recognized that opening the doors to employment and places of public accommodation would be of little use to disabled people if they were unable to travel beyond their homes. The transportation provisions of the ADA are found in both Titles II and III of the Act.

A. Title II: Public Entities

Title II of the ADA deals with the provision of public transportation by public entities. The term "public entity" is defined as including any state or local government (including any department, agency or other instrumentality of such government) and the National Railroad Passenger Corporation and any rail commuter authority.[73]

To ensure effective implementation of this part, the Attorney General is required to promulgate regulations for carrying out the provisions of Title II within one year of the Act's enactment.[74] Such regulations must be consistent with the regulations enacted under Section 504 of the Rehabilitation Act.[75] Moreover, the regulations must include standards with respect to covered facilities and vehicles that are consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board (ATBCB).[76]

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[71] The Report of the Senate Committee on Labor and Human Resources concludes that "about 8.2 million people with disabilities want to work but cannot find a job." Americans with Disabilities Act of 1989, S. Rep. No. 116, 101st Cong., 1st Sess. 9 (1989).

[72] In conjunction with the employment provisions of the ADA, the Medicaid-Buy-in plan that became effective in July 1990 will assist disabled persons in entering the workforce. Prior to July 1990, persons on social security disability income (SSDI) who worked more than 48 months would lose their Medicaid benefits. 20 C.F.R. §416.260 (1989). Medical expenses—including costs for periodic hospitalization, medicine and supplies—can be so extensive for some disabled persons that, when faced with the potential loss of Medicaid benefits, individuals might have found themselves financially unable to work in spite of the job opportunities made available as a result of the ADA. Many disabled people could simply not afford to work longer than 48 months if that meant they would lose their Medicaid benefits. Under the law effective as of July 1990, however, SSDI beneficiaries may continue their Medicaid Part A benefits (which include inpatient hospitalization, skilled nursing facility care and home health care) by paying the cost of the premiums themselves. 42 U.S.C.A. §§1395i-2a (West Supp. 1990). Moreover, those disabled persons with low earning power are entitled to receive a Medicaid subsidy to cover all or part of the premium. *Id.*

[73] ADA §201(1), 136 *Cong. Rec.* H4585 (July 12, 1990).

[74] ADA §204(a), 136 *Cong. Rec.* H4585 (July 12, 1990).

[75] ADA §204(b), 136 *Cong. Rec.* H4585 (July 12, 1990).

1. Part I of Title II

Part I of Subtitle B of Title II covers "public transportation" provided by bus or by rail (excluding commuter rail services, which are covered by part II of Subtitle B of Title I), or by any other conveyance (such as vans or limousines), not including air travel[77] that provides the general public with transportation services on a regular basis.[78] The major components of part I provide as follows:

1. All new buses or rail vehicles solicited for purchase or lease more than 30 days after enactment of the Act by public entities operating fixed-route systems[79] must be "readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs."[80] Thus, new buses and rail systems will have to be fitted with lifts or ramps and fold-up seats or other wheelchair spaces with appropriate securement devices. An exception to this rule is made where lifts for new vehicles are unavailable despite good-faith efforts by the public entity to locate such lifts.[81] However, a public entity must apply for any such exemption to the Secretary of Transportation; any exemption granted will be merely temporary, and will be limited in duration to a specified date.[82]

2. A public entity operating a fixed-route system that purchases or leases a used vehicle more than 30 days after enactment of the Act must have demonstrated good-faith efforts to purchase or lease a used vehicle that is readily accessible to and usable by individuals with disabilities.[83]

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[76] ADA §204(c), 136 *Cong. Rec.* H4585 (July 12, 1990). For a discussion of the guidelines issued by the ATBCB, *see* section I(C) of chapter 11 of this text, *supra*.

[77] Discrimination in air travel is prohibited by the Air Carriers Access Act, 49 U.S.C.A. §1374(c) (West Supp. 1990). For a discussion of the Air Carriers Access Act, *see* section II(B) of chapter 10 of this text, *supra*.

[78] ADA §221(2), 136 *Cong. Rec.* H4585 (July 12, 1990).

[79] A "fixed route system" is defined as "a system of providing designated public transportation on which a vehicle is operated along a prescribed route according to a fixed schedule." ADA §221(3), 136 *Cong. Rec.* H4585 (July 12, 1990).

[80] ADA §222(a), 136 *Cong. Rec.* H4585 (July 12, 1990). A violation of this requirement constitutes a violation of *both* the ADA and Section 504. *Id.*

[81] ADA §225(a), 136 *Cong. Rec.* H4586 (July 12, 1990).

[82] ADA §225(a) and (b), 136 *Cong. Rec.* H4586 (July 12, 1990).

[83] ADA §222(b), 136 *Cong. Rec.* H4585 (July 12, 1990). A violation of this requirement constitutes a violation of *both* the ADA and Section 504. *Id.*

3. A public entity operating a fixed-route system that remanufactures a vehicle so as to extend its life for five years, or purchases or leases such a remanufactured vehicle, shall ensure that "to the maximum extent feasible," the vehicle is readily accessible to and usable by individuals with disabilities.[84]

4. If a public entity operates a public transportation fixed route that is not accessible to certain people with disabilities, the entity must provide paratransit or other special transportation services[85] sufficient to provide a "comparable level of services" to disabled people and their companions as that provided to non-disabled persons,[86] unless the provision of such services would constitute an "undue financial burden."[87] If the provision of comparable special transportation services would, in the opinion of the Secretary of Transportation, constitute an undue financial burden, the entity must provide such services to the extent that providing such services would not impose an undue financial burden.[88] The Secretary also has the discretion to require a public transit authority to provide paratransit services beyond those required by this section.[89]

Four factors relating to the provision of paratransit services are worthy of note. First, this section does not require a public entity that only provides commuter bus service to provide paratransit services.[90] Second, this section only requires that public entities respond to the request of disabled persons for paratransit services "*to the extent practicable*" to meet the comparable level of services provided to individuals without disabilities.[91] This provides the entity with considerable leeway. Third, public entities are required to provide paratransit services for disabled persons only in three circumstances: (1) when an individual's disability precludes him or her from boarding, riding, or disembarking on accessible transportation vehicles without the assistance of another individual; (2) when a disabled person requires an accessible transportation vehicle during the hours of operation of the fixed-route service, but an accessible vehicle is not being provided during the time that the disabled individual requires transportation services; and (3) when an individual's disability prevents him or her from traveling to a boarding or disembarking location and he or she is thus unable to utilize public transportation services.[92] Finally, the requirement that paratransit services be provided to disabled people and their companions is limited to *one* companion of the individual, except that other companions will be permitted to ride with the disabled person to the extent that space is available.[93] The intent was to allow disabled persons to attend functions with non-disabled family members and friends but at the same time refrain from overburdening the paratransit system.

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[84] ADA §222(c)(1), 136 *Cong. Rec.* H4585 (July 12, 1990). The 30-day timeframe applies to this rule too. An exception is made for "historic vehicles," however, if alteration of the vehicle would significantly alter the historic character of the vehicle. ADA §222(c)(2), 136 *Cong. Rec.* H4585 (July 12, 1990). Again, a violation of the rule regarding remanufactured vehicles will constitute a violation of *both* the ADA and Section 504.

[85] The term "paratransit" is not defined in the Act. Generally, however, paratransit services are those provided by van, taxi, car, or limousine rather than by bus or rail.

[86] ADA §223(a) 136 *Cong. Rec.* H4585-86 (July 12, 1990).

[87] ADA §223(c)(4), 136 *Cong. Rec.* H4586 (July 12, 1990). A violation of these provisions constitutes a violation of *both* the ADA and Section 504. *Id.*

[88] *Id.*

[89] ADA §223(c)(5), 136 *Cong. Rec.* H4586 (July 12, 1990).

[90] ADA §223(a), 136 *Cong. Rec.* H4586 (July 12, 1990). In addition, paratransit services need only be provided in the service area in which the public entity operates a fixed-route service, and not in any portion of the service area in which the entity provides only commuter bus service. ADA §223(c)(2), 136 *Cong. Rec.* H4586 (July 12, 1990).

[91] *Id.* (emphasis added)

While the substantive requirements relating to the provision of paratransit services take effect 18 months after enactment of the Act, the remaining portions of this section become effective on the date of the ADA's enactment.[94] Thus, the Act provides that within 18 months of its enactment, and annually thereafter, each public entity operating a fixed route system must submit to the Secretary a plan for providing the required paratransit services.[95]

5. If a public entity operates a "demand responsive system"[96] for the general public, all vehicles solicited for purchase or lease within 30 days after enactment of the Act must be readily accessible to and usable by individuals with disabilities, unless the entity can demonstrate that its system, when viewed in its entirety, provides "equivalent" services to disabled persons as those provided to non-disabled persons.[97]

6. All new facilities built by public entities more than 18 months after the Act's enactment[98] that will be used to provide public transportation services must be made readily accessible to and usable by individuals with disabilities.[99]

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[92] ADA §223(c)(1), 136 *Cong. Rec.* H4586 (July 12, 1990).

[93] ADA §223(c)(1)(B), 136 *Cong. Rec.* H4586 (July 12, 1990).

[94] ADA §231, 136 *Cong. Rec.* H4587 (July 12, 1990). (Section 223(a) becomes effective 18 months after enactment of the Act, but the remaining provisions of Section 223 become effective on the date of enactment of the Act).

[95] ADA §223(7), 136 *Cong. Rec.* H4586 (July 12, 1990).

[96] A "demand responsive system" is defined as "any system providing designated public transportation which is not a fixed route system." ADA §221(1), 136 *Cong. Rec.* H4585 (July 12, 1990).

[97] ADA §224, 136 *Cong. Rec.* H4586 (July 12, 1990). A violation of this provision constitutes a violation of *both* the ADA and Section 504. *Id.*

[98] *See* ADA §231, 136 *Cong. Rec.* H4587 (July 12, 1990) (explaining that this section becomes effective 18 months after enactment of the Act).

[99] ADA §226, 136 *Cong. Rec.* H4587 (July 12, 1990). A violation of this section constitutes a violation of *both* the ADA and Section 504. *Id.*

7. Alterations made to existing facilities or parts of existing facilities more than 18 months after enactment of the Act[100] must be made in such manner that "to the maximum extent feasible" the altered portions are readily accessible to and usable by individuals with disabilities.[101]

8. "Key stations"[102] of rapid-rail and light-rail systems must be made readily accessible to and usable by individuals with disabilities "as soon as practicable but in no event later than" three years after the Act's enactment.[103] The three-year period may be extended up to 30 years by the Secretary for stations that need "extraordinarily expensive structural changes."[104] However, as of 20 years after enactment of the Act, at least two-thirds of all key stations must be readily accessible to and usable by individuals with disabilities.[105] Public entities must develop plans for compliance with these requirements.[106]

9. Public entities operating transportation programs and activities in existing facilities must do so in such a manner that "when viewed in the entirety" each program or activity is readily accessible to and usable by individuals with disabilities.[107] This is a lower standard than the standard applied to key stations, because, in the latter case, the "when viewed in the entirety" language is omitted.

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[100] *See* note 92, *supra*.

[101] ADA §227(a), 136 *Cong. Rec.* H4587 (July 12, 1990). A violation of this section constitutes a violation of *both* the ADA and Section 504. *Id.* This section further provides:

> Where the public entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations, where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).
>
> The Senate version of the Act would have required that, when major structural alterations are made, the alterations *and* the path of travel must be accessible to individuals with disabilities to the maximum extent feasible. The final version of this paragraph was substantially diluted in impact.

[102] "Key stations" are those that have high ridership or serve as transfer and feeder stations.

[103] ADA §227(b)(1) and (2), 136 *Cong. Rec.* H4587 (July 12, 1990). (*See* ADA 231, 136 *Cong. Rec.* H4587 (July 12, 1990), for an explanation that Section 227(b) becomes effective on the date of the Act's enactment). Again, a violation of this provision constitutes a violation of both the ADA and Section 504. *Id.*

[104] ADA §227(b)(2)(B), 136 *Cong. Rec.* H4587 (July 12, 1990).

[105] *Id.*

[106] ADA §227(b)(3), 136 *Cong. Rec.* H4587 (July 12, 1990).

[107] ADA §228(a)(1), 136 *Cong. Rec.* H4587 (July 12, 1990). A violation of this provision constitutes a violation of both the ADA and Section 504. *Id.*

Thus, this provision further provides that it shall not be construed to require public entities to make facilities wheelchair accessible except to the extent required by the previously discussed sections relating to alteration of existing facilities and key stations.[108] In addition, this provision states that even when facilities must be made wheelchair accessible (such as in the case of alteration of an existing facility or required accessibility of key stations), facilities need not be made wheelchair accessible when individuals who use wheelchairs "could not utilize or benefit from such services provided at such facilities."[109] It is not clear to the authors when individuals in wheelchairs "could not utilize or benefit from such services." This appears to be a rather subjective standard and will obviously have to be considered on a case-by-case basis. This phrase, which on its face appears to provide a broad loophole to the accessibility requirement, may prove to be of academic interest rather than of practical significance.

10. When a public entity operates a light- or rapid-rail system containing two or more cars, at least one vehicle per train must be accessible to individuals with disabilities "as soon as practicable but in no event later" than five years after enactment of the Act.[110]

Within one year of enactment of the Act, the Secretary of Transportation is required to issue regulations necessary to carry out part I of Title II.[111] The regulations must be consistent within those promulgated under Section 504 and with the guidelines promulgated by the ATBCB.[112]

2. Part II of Title II

Part II of Subtitle B of Title II deals with public transportation by intercity[113] and commuter rail services.[114] This part also covers stations owned exclusively or in part by public entities, as well as stations owned solely by private parties.[115] The salient provisions of Part II are as follows:

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[108] ADA §228(a)(2), 136 *Cong. Rec.* H4587 (July 12, 1990).

[109] ADA §228(a)(3), 136 *Cong. Rec.* H4587 (July 12, 1990).

[110] ADA §228(b)(1), 136 *Cong. Rec.* H4587 (July 12, 1990). (*See* ADA §231, 136 *Cong. Rec.* H4587 (July 12, 1990) for an explanation that section 228 becomes effective on the date of enactment of the Act). A violation of this section constitutes a violation of *both* the ADA and Section 504. *Id.* Again, however, an exception is made for historic trains when rendering the train accessible would significantly alter its historic character. ADA §228(b)(2), 136 *Cong. Rec.* H4587 (July 12, 1990).

[111] ADA §229(a), 136 *Cong. Rec.* H4587 (July 12, 1990).

[112] *Id.*

[113] The term "intercity rail transportation" is defined as "transportation provided by the National Railroad Passenger Corporation." ADA §241(3), 136 *Cong. Rec.* H4587 (July 12, 1990).

[114] The term "commuter rail transportation" is given the same meaning as such services under Section 103(9) of the Rail Passenger Service Act, 45 U.S.C.A. §502(9) (1987). *See* ADA §241(2), 136 *Cong. Rec.* H4587 (July 12, 1990). Section 103(9) of the Rail Passenger Service Act defines the term "commuter service" as "short-haul rail passenger service operated in metropolitan and suburban areas, whether within or across the geographical boundaries of a State usually characterized by reduced fare, multiple-ride and commutation tickets and by morning and evening peak period operations."

1. A person or entity that provides intercity rail transportation or commuter rail transportation must have at least one passenger car per train that is readily accessible to and usable by individuals with disabilities "as soon as practicable, but in no event later than 5 years after the date of enactment of this Act."[116]

2. A person or entity that makes a solicitation for, or purchases or leases, any new rail passenger car for use in intercity rail or commuter rail transportation more than 30 days after enactment of the Act must ensure that such cars are readily accessible to and usable by individuals with disabilities.[117] This proviso contains very detailed requirements with respect to the wheelchair accessibility of coach cars and dining cars. Generally, this section requires coach cars to be able to be entered by an individual in a wheelchair, to have space to park and secure a wheelchair, to have a seat to which a passenger in a wheelchair can transfer, and to have a restroom accessible to an individual in a wheelchair.[118] Dining cars are generally not required to be wheelchair accessible from the station, however, although single level dining cars must be accessible from within the train.[119] Moreover, with respect to the purchase of new rail passenger cars for use in *commuter rail* transportation, the requirement that new cars be readily accessible

> shall not be construed to require — (i) a restroom usable by an individual who uses a wheelchair if no restroom is provided in such car for any passenger; (ii) space to fold and store a wheelchair; or (iii) a seat to which a passenger who uses a wheelchair can transfer.[120]

This substantially limits the requirement that newly purchased cars used for commuter rail transportation be wheelchair accessible. Apparently accessibility and usability for commuter rail vehicles is limited to accessibility for entry and space to park and secure a wheelchair.

3. A person or entity that purchases or leases a used rail passenger car for use in intercity or commuter rail transportation must make "demonstrated good faith

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[115] *See* ADA §§241(5) and (6), 136 *Cong. Rec.* H4587-88 (July 12, 1990).

[116] ADA §§242(a)(1) and 242(b)(1), 136 *Cong. Rec.* H4588 (July 12, 1990). A violation of these provisions constitutes a violation of both the ADA and Section 504. *Id.*

[117] ADA §§242(a)(2)(A) and 242(b)(2)(A), 136 *Cong. Rec.* H4588 (July 12, 1990). (*See* ADA §246(a), 136 *Cong. Rec.* H4589 (July 12, 1990) for an explanation that section 242 of the Act becomes effective on the date of enactment of the Act.) A violation of this provision constitutes a violation of both the ADA and Section 504. *Id.*

[118] *See, e.g.*, §ADA 242(a)(2)(B)(i), 136 *Cong. Rec.* H4589 (July 12, 1990).

[119] *See, e.g.*, ADA §§242(a)(2)(C) and (D) and 242(a)(4)(A) and (B), 136 *Cong. Rec.* H4588 (July 12, 1990).

[120] ADA §242(b)(2)(B), 136 *Cong. Rec.* H4588 (July 12, 1990).

efforts to purchase or lease a used rail car that is readily accessible to and usable by individuals with disabilities . . . ."[121]

4. A person or entity that remanufactures a rail passenger car for use in intercity or commuter rail transportation so as to extend its life for ten years must ensure that the rail car, "to the maximum extent feasible," is made readily accessible to and usable by individuals with disabilities.[122]

5. A person or entity that builds a new station for use in intercity or commuter rail transportation must ensure that the station is readily accessible to and usable by individuals with disabilities.[123]

6. Existing stations used in intercity rail transportation systems must be made accessible to and usable by persons with disabilities "as soon as practicable" but in no event later than 20 years after the Act's enactment.[124] The obligation to implement this provision falls upon the statutorily defined "responsible person," which is the public entity if it owns more than 50 percent of a station, the persons providing transportation to a station when more than 50 percent of the station is owned by a private party, or the persons providing transportation and the public owners of a station when no party owns more than 50 percent of the station.[125]

7. Existing key stations used in commuter rail transportation systems must be made readily accessible to and usable by individuals with disabilities — by the responsible person — "as soon as practicable," but in no event later than three years after the Act's enactment.[126] The Secretary of Transportation, however, may extend this time limit up to 20 years after the Act's enactment "in a case where the raising of the entire passenger platform is the only means available of attaining accessibility or where other extraordinarily expensive structural changes are necessary to attain accessibility."[127]

8. Alterations to existing stations or parts thereof used in intercity or commuter rail transportation systems must be made—by the responsible person, owner or person in control of the station— in a manner to ensure that "to the maximum extent feasible" the altered portions are readily accessible to and usable

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[121] ADA §242(c), 136 *Cong. Rec.* H4588 (July 12, 1990). A violation of this provision constitutes a violation of both the ADA and Section 504. *Id.*

[122] ADA §242(d), 136 *Cong. Rec.* H4588-89 (July 12, 1990). A violation of this provision constitutes a violation of both the ADA and Section 504. *Id.*

[123] ADA §242(e)(1), 136 *Cong. Rec.* H4589 (July 12, 1990). A violation of this provision constitutes a violation of both the ADA and Section 504. *Id.*

[124] ADA §§242(e)(2)(i) and (ii)(I), 136 *Cong. Rec.* H4589 (July 12, 1990). A violation of this provision constitutes a violation of both the ADA and Section 504. *Id.*

[125] ADA §241(5), 136 *Cong. Rec.* 4588 (July 12, 1990).

[126] ADA §§242(e)(2)(i) and (ii)(II), 136 *Cong. Rec.* H4589 (July 12, 1990). A violation of this provision constitutes a violation of both the ADA and Section 504. *Id.*

[127] ADA §242(e)(2)(ii)(II), 136 *Cong. Rec.* H4589 (July 12, 1990).

by individuals with disabilities.[128] Within one year of the Act's enactment, the Secretary of Transportation is required to issue regulations necessary to carry out Part II of Subtitle B of Title II.[129] The regulations must be consistent with those promulgated under Section 504 and with the minimum guidelines promulgated by the ATBCB.[130]

3. Enforcement of Title II

Enforcement of Title II is intended to parallel enforcement under Section 504. Thus, Title II incorporates the remedies, procedures, and rights set forth in Section 505 of the Rehabilitation Act.[131] In addition to private suits, it is anticipated that the United States Department of Justice will oversee compliance with Title II and file suit under the Act when appropriate.[132]

B. Title III: Private Entities

Title III of the ADA includes within its coverage the provision of public transportation by private entities. As of 18 months after enactment of the Act[133] private entities that are primarily engaged in the business of transporting people (other than by air travel) are prohibited from discriminating on the basis of disability.[134] The most crucial requirements to be followed by private entities primarily engaged in the business of transporting people are as follows:

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[128] ADA §242(e)(2)(B)(i), 136 *Cong. Rec.* H4589 (July 12, 1990). A violation of this provision constitutes a violation of both the ADA and Section 504. *Id.* This section further provides that when an alteration will

> affect or could affect the usability of or access to an area of the station containing a primary function . . . the alterations [must be made] in such manner that, to the maximum extent feasible, the path of travel to the altered area, and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations, where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

ADA §242(e)(2)(B)(ii), 136 *Cong. Rec.* H4589 (July 12, 1990).

[129] ADA §244, 136 *Cong. Rec.* H4589 (July 12, 1990).

[130] ADA §243, 136 *Cong. Rec.* H4589 (July 12, 1990).

[131] ADA 203, 136 *Cong. Rec.* H4585 (July 12, 1990). For a comprehensive analysis of the remedies available under Section 505 of the Rehabilitation Act (29 U.S.C.A. §794a (1985)), *see* chapter 8 of this text, *supra.*

[132] *See Americans with Disabilities Act of 1989: Hearings Before the Comm. on Labor and Human Resources and the Subcomm. on the Handicapped,* 101st Cong., 1st Sess., 57-58(1989) (hereinafter Senate Committee Report).

[133] *See generally* ADA §310(a), 136 *Cong. Rec.* H4593 (July 12, 1990). There are some exceptions to the 18-month rule—some provisions of Title III become effective on the date of enactment. When applicable, those exceptions will be explained later in this chapter.

1. All new vehicles (other than vans with seating capacities of fewer than 8 passengers and over-the-road buses[135]) used to provide specified public transportation services[136] solicited for purchase or lease more than 30 days after enactment of the Act must be readily accessible to and usable by individuals with disabilities (including individuals who use wheelchairs).[137] If, however, a new vehicle is to be used solely in a demand-responsive system and the entity can "demonstrate that such system, when viewed in its entirety, provides a level of service to [disabled] individuals equivalent to the level of service provided to the general public," compliance with this provision is not required.[138]

2. All new vans with a seating capacity of fewer than eight passengers used to provide specified public transportation services solicited for purchase or lease more than 30 days after enactment of the Act must be readily accessible to and usable by persons with disabilities ***unless*** "the entity can demonstrate that the system for which the van is being purchased or leased, when viewed in its entirety, provides a level of service to [disabled] individuals equivalent to the level of service provided to the general public."[139]

3. All new rail passenger cars used to provide specified public transportation solicited for purchase or lease more than 30 days after enactment of the Act must be readily accessible to and usable by individuals with disabilities.[140]

4. All rail passenger cars used to provide specified public transportation that are remanufactured so as to extend their life for ten years or more, or any such remanufactured rail car newly purchased or leased, must, to the maximum extent feasible, be readily accessible to and usable by individuals with disabilities.[141]

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[134] ADA §304(a), 136 *Cong. Rec.* H4591 (July 12, 1990).

[135] The term "over-the-road bus" is defined as "a bus characterized by an elevated passenger deck located over a baggage compartment." ADA §301(5), 136 *Cong. Rec.* H4589 (July 12, 1990).

[136] The term "specified public transportation" is defined as "transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis." ADA §301(10), 136 *Cong. Rec.* H4590 (July 12, 1990).

[137] ADA §304(b)(3), 136 *Cong. Rec.* H4591 (July 12, 1990).

[138] *Id.*

[139] ADA §304(b)(5), 136 *Cong. Rec.* H4591 (July 12, 1990).

[140] ADA §304(b)(6), 136 *Cong. Rec.* H4591 (July 12, 1990).

[141] ADA §304(b)(7), 136 *Cong. Rec.* H4591 (July 12, 1990). An exception is made, however, for historical or antiquated rail passenger cars—or a rail station served exclusively by such cars. ADA §304(c), 136 *Cong. Rec.* H4591 (July 12, 1990).

The Senate version of the ADA would have required all new over-the-road buses solicited for purchase or lease by "small providers" more than seven years after enactment of the Act to be accessible to disabled users, and all new over-the-road buses solicited for purchase or lease by "other providers" more than six years after enactment of the Act to be accessible to disabled users. Those time periods were deleted from the final Act. Rather, the ADA, as enacted, provides that the purchase of new over-the-road buses must be made in accord with regulations to be issued by the Department of Transportation.[142]

The ADA requires the Secretary of Transportation to issue interim regulations to carry out those sections of the Act relating to accessible over-the-road buses within one year after enactment of the Act.[143] Those interim regulations cannot require structural changes to over-the-road buses or require the purchase of boarding-assistance devices.[144] Meanwhile, the Office of Technology Assessment is required to undertake a study—to be completed within 36 months of the Act's enactment[145]—to determine

> (1) the access needs of individuals with disabilities to over-the-road buses and over-the-road bus service; and
> (2) the most cost-effective methods for providing access to over-the-road buses and over-the-road bus service to individuals with disabilities, particularly individuals who use wheelchairs, through all forms of boarding options.[146]

Within one year after submission of this study, the Secretary of Transportation is required to issue new regulations relating to the ADA provisions requiring accessibility of over-the-road buses.[147] With respect to "small providers" of transportation—as that term is defined by the Secretary—the regulations will take effect seven years after the Act's enactment; with respect to "other" providers of transportation, the regulatory provisions—whatever those provisions may be—will take effect six years after the Act's enactment.[148] The regulations, however, may "not require the installation of accessible restrooms in over-the-road buses if such installation would result in a loss of seating capacity."[149]

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[142] ADA §304(b)(4), 136 *Cong. Rec.* H4591 (July 12, 1990).

[143] ADA §306(a)(2)(A)(i), 136 *Cong. Rec.* H4592 (July 12, 1990).

[144] *Id.*

[145] ADA §305(d), 136 *Cong. Rec.* H4592 (July 12, 1990). The President of the United States has the discretion to extend that deadline by one year if he or she finds that the effect of the earlier deadline would be to "result in a significant reduction in intercity over-the-road bus service." *Id.*

[146] ADA §305(a), 136 *Cong. Rec.* H4591 (July 12, 1990).

[147] ADA §306(a)(2)(B)(ii), 136 *Cong. Rec.* H4592 (July 12, 1990).

[148] ADA §306(a)(2)(B)(iii), 136 *Cong. Rec.* H4592 (July 12, 1990).

[149] ADA §306(a)(2)(C), 136 *Cong. Rec.* H4592 (July 12, 1990).

Title III of the ADA also deals with the provision of public services by private entities that are not primarily engaged in the business of transporting people, and thus are not covered by Section 304 of the Act. Such entities must follow the following requirements:

1. A private entity (not subject to Section 304) that operates a fixed route system, and makes a solicitation more than 30 days after enactment of the Act for the purchase or lease of a vehicle with a seating capacity of 16 or fewer passengers for use in such system, must ensure that such vehicles are readily accessible to and usable by individuals with disabilities.[150] A private entity might be exempt from this provision, however, if it can show that its fixed-route system, when viewed in its entirety, ensures a level of service to disabled individuals equivalent to the level of service provided to nondisabled individuals.[151]

2. A private entity (not subject to Section 304) that operates a demand-responsive system must operate its system so that, when viewed in its entirety, the system ensures a level of service to disabled individuals equivalent to the level of service provided to non-disabled individuals.[152]

Neither of the above provisions, however, apply to over-the-road buses.[153] Rather, the provisions relating to regulations to be promulgated by the Secretary of Transportation, explained above, apply with respect to *all* over-the-road buses operated by private entities.[154]

C. General

The transportation provisions of the ADA were among the most hotly contested provisions of the Act. Thus, notably absent from those provisions are requirements that currently existing buses, whether leased or owned by public or private entities, be retrofitted to accommodate disabled people. And private entities will not be obligated to purchase accessible over-the-road buses for several years. Indeed, protests abounded over the initial (Senate) requirement that over-the-road buses purchased or leased by private entities more than five or six years after enactment of the Act must be accessible. Greyhound Corporation, for example, argued that compliance with the ADA would cost $40 million a year, "a sum that dwarfs its expected 1989 profit of $8.5 million."[155] Greyhound claimed that while it could

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[150] ADA §302(b)(2)(B)(i), 136 *Cong. Rec.* H4590 (July 12, 1990).

[151] ADA §302(b)(2)(B)(ii), 136 *Cong. Rec.* H4590 (July 12, 1990).

[152] ADA §302(b)(2)(C), 136 *Cong. Rec.* H4590 (July 12, 1990).

[153] ADA §302(b)(2)(D)(i), 136 *Cong. Rec.* H4591 (July 12, 1990).

[154] ADA §302(b)(2)(D)(ii), 136 *Cong. Rec.* H4591 (July 12, 1990).

[155] "Busing in Higher Costs," *Wall Street Journal*, Nov. 20, 1989, 1, at 18, col. 1.

"survive by raising fares and dropping unprofitable rural routes, . . . the [ADA] could significantly harm other inter-city buses."[156] Disabled rights advocates, however, have contended that the cost estimates cited by the transportation companies are unrealistic and erroneous. For example, during congressional hearings on the ADA, Greyhound alleged that it costs $35,000 to purchase one lift for an over-the-road bus.[157] Other testimony, however, indicated that lifts could be purchased for less than $8,000.[158] It is to reconcile these conflicting viewpoints, and to uncover the true facts, that the ADA provides that the Office of Technology Assessment must undertake a study to determine, *inter alia*, "the most cost effective methods for providing access to over-the-road buses and over-the-road bus service to individuals with disabilities, particularly individuals who use wheelchairs, through all forms of boarding options."[159]

IV. Places of Public Accommodation

Title III of the ADA also prohibits discrimination against disabled people—or against others because of their affiliation with a disabled person[160]—in *all places* of public accommodation.[161] Covered entities under Title III include privately operated: (1) inns, hotels, motels or similar places of lodging (but not including an establishment in which the proprietor resides and rents out five or fewer rooms); (2) restaurants, bars and all other establishments serving food and drink; (3) theaters, concert halls, stadiums and all other places of exhibition or entertainment; (4) auditoriums, convention centers, lecture halls and other places of public gatherings; (5) all sales or rental establishments, such as bakeries, grocery stores, clothing stores, hardware stores, drug stores or shopping centers; (6) all service establishments, such as laundromats, dry cleaners, banks, barber and beauty shops, travel agencies, shoe repair shops, gas stations, funeral parlors, pharmacies, insurance offices, and offices of lawyers, doctors, dentists and other health care providers; (7) stations used for specified public transportation; (8) museums, libraries, galleries and all other places of public display or collection; (9) parks, zoos, amusement parks and all other places of recreation; (10) places of education, including nurseries, elementary, secondary, undergraduate, or postgraduate private schools; (11) social service centers, such as day care centers, senior citizen centers, homeless shelters, food banks or adoption programs; and (12) all places of exercise or recreation, such as gymnasiums, health spas, bowling alleys or golf courses.[162]

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[156] *Id.*

[157] Senate Committee Report, *supra* note 132, at 586.

[158] *Id.* at 172-73, 181.

[159] ADA §305(a)(2), 136 *Cong. Rec.* H4591 (July 12, 1990). The study is to include an analysis of the following *minimum* factors:

> (1) The anticipated demand by individuals with disabilities for accessible over-the-road buses and over-the-road bus service.
>
> (2) The degree to which such buses and service, including any service required under sections 304(b)(4) and 306(a)(2), are readily accessible to and usable by individuals with disabilities.
>
> (3) The effectiveness of various methods of providing accessibility to such buses and service to individuals with disabilities.
>
> (4) The cost of providing accessible over-the-road buses and bus service to individuals with disabilities, including consideration of recent technological and cost saving developments in equipment and devices.
>
> (5) Possible design changes in over-the-road buses that could enhance accessibility, including the installation of accessible restrooms which do not result in a loss of seating capacity.
>
> (6) The impact of accessibility requirements on the continuation of over-the-road bus service, with particular consideration of the impact of such requirements on such service to rural communities.

ADA §305(b), 136 *Cong. Rec.* H4591 (July 12, 1990).

[160] ADA §302(b)(1)(E), 136 *Cong. Rec.* H4590 (July 12, 1990). That section provides:

> It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

Unlike the definition of the term "employer" under the ADA, the definition of the term "places of public accommodation" is not limited to entities of a certain size or having a certain number of employees. Thus, *all* places of public accommodation must comply with Title III's accessibility requirements. Title III covers only non-resident portions of covered entities, however. Residential accommodations (places of permanent residency as opposed to temporary lodging in hotels and inns) are covered by the federal Fair Housing Act.[163] And religious organizations and entities controlled by religious organizations are exempt from the Act,[164] as are private clubs or establishments that are exempt from coverage under Title II of the Civil Rights Act of 1964.[165] Owners and operators of places of public accommodation must allow disabled people to participate in an equal fashion or to benefit equally from the goods, services, facilities, advantages or accommodations provided by the entity.[166] Further, "[g]oods, services, facilities, privileges, advantages, and accommodations [must] be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual."[167] Generally, owners and operators of places of public accommodation are required to make "reasonable modifications" in their practices, policies or procedures, or to provide "auxiliary aids and services"[168] for disabled persons, *unless* such modifications would "fundamentally alter" the nature of the goods, services, facilities, privileges, advantages and accommodations offered or would result in an "undue burden."[169] While the term "undue burden" is not defined in the ADA, the definition of that term is presumably the same as the definition of the term "undue hardship" utilized in the employment context under the Act.[170] This section, however, does not require that persons with disabilities "must achieve the identical result or level of achievement of nondisabled persons, but does require that persons with disabilities must be afforded equal opportunity to obtain the same result."[171] Thus, for example, a restaurant need not provide Braille menus for blind patrons if it provides a waiter or other employee to read the menu.[172] Further, owners and operators of places of public accommodation are prohibited from imposing or applying eligibility criteria that "screen out or tend to screen out" individuals with disabilities "from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations," unless such criteria are necessary for the provision of such goods, services or accommodations.[173]

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[161] ADA §302(a), 136 *Cong. Rec.* H4590 (July 12, 1990). This section provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

[162] ADA §301(7), 136 *Cong. Rec.* H4589-90 (July 12, 1990).

[163] 42 U.S.C.A. §§3601-3619 (1977 and West Supp. 1990).For an analysis of the Fair Housing Act, *see* section II of chapter 11, *supra*.

[164] ADA §307, 136 *Cong. Rec.* H4592 (July 12, 1990).

[165] *Id.* Title II of the Civil Rights Act of 1964, 42 U.S.C.A. §§2000a—2000a-(e) (1981), prohibits discrimination on the basis of race, color, religion or national origin with respect to the "equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation. . . ." That title exempts from coverage private clubs not open to the public, "except to the extent that the facilities of such establishment are made available to the customers or patrons of" a public establishment. 42 U.S.C.A. §§2000a-(e) (1981).

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[166] ADA §§302(b)(1)(A)(i)(ii)(iii) and (iv), 136 *Cong. Rec.* H4590 (July 12, 1990). These provisions preclude discrimination against disabled persons "directly, or through contractual, licensing or other arrangements." Moreover, these provisions prohibit discrimination on the basis of disability against "the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement." ADA §302(b)(1)(A)(iv), 136 *Cong. Rec.* H4590 (July 12, 1990).

[167] ADA §302(b)(1)(B), 136 *Cong. Rec.* H4590 (July 12, 1990).

[168] The term "auxiliary aids and services" is defined as including

> (A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
>
> (B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;
>
> (C) acquisition or modification of equipment or devices; and
>
> (D) other similar services and actions.

ADA §3(1), 136 *Cong. Rec.* H4582 (July 12, 1990).

[169] ADA §§302(b)(2)(A)(ii) and (iii), 136 *Cong. Rec.* H4590 (July 12, 1990).

[170] *See* note 38 of this chapter, *supra.*

[171] Senate Committee Report, *supra* note 132, at 60.

[172] *Id.* at 63.

[173] ADA §302(b)(2)(A)(i), 136 *Cong. Rec.* H4590 (July 12, 1990).

Covered entities under Title III are also required to remove structural architectural and communication barriers in existing facilities, and transportation barriers in existing vehicles used for transporting individuals, where such removal is "readily achievable."[174] The "readily achievable" standard is much lower than the "undue burden" or "undue hardship" standards, and is defined as meaning "easily accomplishable and able to be carried out without much difficulty or expense."[175] Factors to be considered when determining whether barrier removal is readily achievable include the nature and cost of the action needed; the financial resources of, and the number of persons employed at, the facility; the effect of the action on the entity's expenses or resources or the impact of the action upon the operation of the facility; and the size, nature and financial resources of the covered entity.[176] If removal of such barriers is not readily achievable, alternative methods—where readily achievable—must be utilized.[177] "Alternative methods" would include an accommodation such as allowing patrons in wheelchairs to be served drinks at tables in a restaurant when non-disabled patrons are required to drink at an inaccessible bar.[178]

The "readily achievable" standard, like the "undue hardship" standard in the employment context, represents a compromise between proponents of the ADA and the business sector. The original version of the ADA required that architectural barriers be removed in two to five years unless such removal would threaten the existence of the entity's business.[179] That proviso was subsequently changed to the more modest "readily achievable" standard.[180]

All *newly constructed* places of public accommodation and "commercial facilities"[181] designed for first occupancy more than 30 months after the date of enactment of the ADA must be readily accessible to and usable by individuals with disabilities unless that is "structurally impracticable."[182] Basically, this requires that such facilities be generally accessible; it does not require that every portion of every facility be accessible. Thus, for example, a doctor's office would be "readily accessible to and usable by" disabled people if it allowed "ready access to the waiting areas, a bathroom, and a percentage of the examining rooms."[183]

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[174] ADA §302(b)(2)(A)(iv), 136 *Cong. Rec.* H4590 (July 12, 1990).

[175] ADA §301(9), 136 *Cong. Rec.* H4590 (July 12, 1990).

[176] ADA §§301(9)(A)(B)(C) and (D), 136 *Cong. Rec.* H4590 (July 12, 1990).

[177] ADA §302(b)(2)(A)(v), 136 *Cong. Rec.* H4590 (July 12, 1990).

[178] Senate Committee Report, *supra* note 132, at 66.

[179] *See, e.g.*, Senate Hearings May and June 1989, *supra* note 41, at 90.

[180] *Id.*

[181] ADA §303(a), 136 *Cong. Rec.* H4591 (July 12, 1990). Originally the Senate version of the Act would have required that "all potential places of employment" be covered by this proviso. Critics contended that that wording was too broad, and it was deleted in the spirit of compromise.

[182] ADA §303(a)(1), 136 *Cong. Rec.* H4591 (July 12, 1990).

[183] Senate Committee Report, *supra* note 132, at 70.

"Accessibility" does not just refer to wheelchair accessibility, however. Rather, that term refers to Braille markings or sound indicators (such as on elevators) for blind persons, to flashing alarms, telecommunication devices and television decoders for deaf persons, and to similar modes of access for individuals with disabilities.

When altering their facilities or portions thereof, covered entities under Title III must make such alterations in a manner that "to the maximum extent feasible" renders the altered portions of the facilities readily accessible to and usable by individuals with disabilities (including individuals who use wheelchairs).[184] A facility having fewer than three stories or fewer than 3,000 square feet per story, however, is not required to install elevators unless the facility is a shopping center, a mall, or the professional office of a health care provider.[185] The Joint Explanatory Statement of the Committee on Conference notes that the exception relating to the installation of elevators

> does not affect the requirement that every newly constructed facility subject to the Act shall have at least one ground story that is readily accessible to and usable by individuals with disabilities. Accessibility requirements shall not be evaded by constructing facilities in such a way that no story constitutes a "ground floor", for example, by constructing a building whose main entrance leads only to stairways or escalators that connect with upper or lower floors; at least one accessible ground story must be provided.[186]

Finally, Title III requires:

> Any person that offers examinations or courses related to applications, licensing, certification or credentialing for secondary or postsecondary education, professional, or trade purposes [18 months after the Act's enactment][187] shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.[188]

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[184] ADA §303(a)(2), 136 *Cong. Rec.* H4591 (July 12, 1990). This section further provides that

> Where the entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

[185] ADA §303(b), 136 *Cong. Rec.* H4591 (July 12, 1990). The Attorney General may determine, however, that a particular category of facilities requires the installation of elevators based on the usage of such facilities. *Id.*

[186] 136 *Cong. Rec.* H4602 (July 12, 1990).

[187] *See* ADA §310, 136 *Cong. Rec.* H4593 (July 12, 1990).

[188] ADA §309, 136 *Cong. Rec.* H4593 (July 12, 1990).

Title III (including the provisions relating to the provision of transportation services by private entities—as discussed in the previous section of this chapter) may be enforced both privately and publicly by the United States Attorney General.[189] Any person who is subject to discrimination on the basis of disability in violation of Title III, and any person who has "reasonable grounds" for believing that he or she is "about to be subjected to discrimination" in violation of the provisions relating to the construction or alteration of places of public accommodation, may file suit under the Act.[190] The Act provides that "[n]othing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this title does not intend to comply with its provisions."[191]

The remedies and procedures set forth in Section 204(a) of the Civil Rights Act of 1964[192] are the remedies and procedures available under Title VII.[193] With respect to violations of the provisions relating to: (1) the failure to remove architectural and communication barriers in existing vehicles and rail passenger cars,[194] and (2) the failure to make newly constructed or altered facilities readily accessible to and usable by persons with disabilities,[195] injunctive relief may include an order requiring that facilities be made readily accessible to and usable by persons with disabilities.[196] Moreover, the Act provides that "[w]here appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by [Title III]."[197]

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[189] ADA §308, 136 *Cong. Rec.* H4592-93 (July 12, 1990).

[190] ADA §308(a)(1), 136 *Cong. Rec.* H4592 (July 12, 1990).

[191] *Id.*

[192] 42 U.S.C.A. §§2000a-3(a) (1981). That section provides as follows:

> Whenever any person has engaged [in] or there are reasonable grounds to believe that person is about to engage in any act or practice prohibited [under the Act], a civil action for preventive relief, including an application for permanent or temporary injunction, restraining order, or other order, may be instituted by the aggrieved and . . . the court may, in its discretion permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application of the complainant. . . the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

[193] ADA §308(a)(1), 136 *Cong. Rec.* H4592 (July 12, 1990).

[194] ADA §302(b)(2)(A)(iv), 136 *Cong. Rec.* H4590 (July 12, 1990). For a discussion of this provision, *see* text at note 174 of this chapter, *supra*.

[195] ADA §303(a)(1) and (2), 136 *Cong. Rec.* H4591 (July 12, 1990). For a discussion of these provisions, *see* text at notes 181 and 184 of this chapter, *supra*.

[196] ADA §308(a)(2), 136 *Cong. Rec.* H4592 (July12, 1990).

[197] *Id.*

The Attorney General has authority to institute "pattern and practice" lawsuits when there is "reasonable cause" to believe that any person or group of persons is engaged in a pattern or practice of discriminating against disabled individuals,[198] or to institute a suit when "any person or group of persons has been discriminated against under [Title III] and such discrimination raises an issue of general public importance."[199] Monetary damages, while not recoverable in private suits, *are* recoverable in suits filed by the Attorney General.[200] Further, with respect to actions filed by the Attorney General, the court has discretion to "vindicate the public interest" by assessing penalties of up to $50,000 for a first violation and $100,000 for subsequent violations.[201] In determining the amount of any such penalty, however, the court must consider "any good faith effort or attempt to comply with this Act by the entity."[202] After much controversy, however, punitive damages are not available under the ADA.[203] Moreover, the Act precludes suits against small businesses with 25 or fewer employees having gross receipts of $1,000,000 or less for 24 months after the Act's enactment,[204] and against small businesses with 10 or fewer employees having gross receipts of $500,000 or less for 30 months after the Act's enactment.[205] The Joint Explanatory Statement of the Committee of Conference explains that in order to file suit against such a small business

> the discriminatory act must occur after the applicable period has expired. The conferees note that this section gives small businesses additional time to learn the requirements of the ADA and to come into compliance with the Act before they will be subject to a civil action. The conferees fully expect that businesses will, however, make good faith efforts to comply with the Act during this additional phase-in period.[206]

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[198] ADA §308(b)(1)(B), 136 *Cong. Rec.* H4592 (July 12, 1990).

[199] *Id.*

[200] ADA §308(b)(2)(B), 136 *Cong. Rec.* H4593 (July 12, 1990).

[201] ADA §308(b)(2)(C), 136 *Cong. Rec.* H4593 (July 12, 1990).

[202] ADA §308(b)(5), 136 *Cong. Rec.* H4593 (July 12, 1990). This provision explains that when evaluating good faith, the court shall consider, among other factors it deems relevant, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability.

[203] ADA §308(b)(4), 136 *Cong. Rec.* H4593 (July 12, 1990).

[204] ADA §§310(a) and (b)(1), 136 *Cong. Rec.* H4593 (July 12, 1990). This 24-month grace period does not apply with respect to a claim that a covered entity has violated the provision of the ADA (§303) requiring that newly constructed or altered facilities be made accessible to disabled people. ADA §310(b), 136 *Cong. Rec.* H4593 (July 12, 1990).

[205] ADA §§310(a) and (b)(2), 136 *Cong. Rec.* H4593 (July 12, 1990). This 30-month grace period does not apply with respect to a claim that a covered entity has violated the provision of the ADA (§303) requiring that newly constructed or altered facilities be made accessible for disabled people. ADA §310(b), 136 *Cong. Rec.* H4593 (July 12, 1990).

[206] 136 *Cong. Rec.* H4606 (July 12, 1990).

V. Telecommunication Relay Services

The final major component of the ADA involves the provision of telecommunication services for hearing-impaired and speech-impaired Americans. There are over 24 million hearing-impaired and 2.8 million speech-impaired individuals in the United States, many of whom are unable to use the telephone. Because the telephone is an essential part of modern American life, Title IV of the ADA amends the Communications Act of 1934[207] to require that all common carriers[208] (generally, telephone companies) provide "functionally equivalent" telecommunication services to allow hearing- and speech-impaired individuals to communicate with hearing people.[209] To fulfill this mandate, within three years of the Act's enactment providers of telecommunication services are obligated to provide "telecommunications relay services,"[210] either "individually, through designees, through a competitively selected vendor, or in concert with other carriers."[211]

Telephone relay services work as follows: Hearing-impaired and speech-impaired persons may utilize Telecommunication Devices for the Deaf (TDDs) to communicate via the telephone. When using a TDD, the telephone receiver is placed into two headset cups on a machine that resembles a small typewriter with a video screen and/or a paper printout. The TDD user types a message on a keyboard, which is relayed to a party on the other end of the line with a similar device. The receiver returns his or her message by typing it to the sender and the conversation proceeds via typewriter and video screen or printout. Because most hearing people do not have TDDs, a relay service is required to allow TDD users to communicate with non-TDD users. Thus, the TDD user calls a relay service, and a relay operator answers via TDD and places the call to the non-TDD user (or vice versa). The operator then relays messages back and forth between the TDD and non-TDD users, typing messages for the TDD user and speaking messages for the non-TDD user.

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[207] 47 U.S.C.A. §§201-222 (1962 and West Supp. 1990). The Communications Act mandates that communication services be made "available, so far as possible, to *all* the people of the United States. . ."' (Section I, emphasis added).

[208] The term "common carrier" includes "any common carrier engaged in interstate communication by wire or radio. . . ." ADA §401(a), 136 *Cong. Rec.* H4593 (July 12, 1990).

[209] ADA §401(a), 136 *Cong. Rec.* H4593 (July 12, 1990) (amending Sections 225(a)(3) and (c) of the Communications Act).

[210] The term "telecommunications relay services" is defined as telephone transmission services that provide the ability for an individual who has a hearing impairment or speech impairment to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice communication services by wire or radio. Such term includes services that enable two-way communication between an individual who uses a TDD or other nonvoice terminal device and an individual who does not use such a device.

ADA §401(a), 136 *Cong. Rec.* H4593 (July 12, 1990)(amending Section 225(a)(3) of the Communications Act).

[211] *Id.* A common carrier must only provide relay services "throughout the area in which it offers service," however. ADA §401(a), 136 *Cong. Rec.* H4593 (July 12, 1990) (amending Section 225(c) of the Communications Act).

The ADA requires the Federal Communications Commission (FCC) to formulate regulations relating to the provision of relay services within one year after the Act's enactment.[212] To ensure the functional equivalence of telecommunication services provided for hearing-impaired and speech-impaired persons, the Act mandates that such relay services shall: (1) operate 24 hours a day, every day;[213] (2) cost no more than regular telephone services;[214] (3) prohibit relay operators from refusing calls or limiting the length of calls;[215] (4) require relay operators to maintain strict confidentiality with respect to all telephone messages relayed;[216] and (5) prohibit relay operators from intentionally altering relayed conversations.[217] Relay operators are subject to the same standard of conduct that other telephone operators are subject to under the Communications Act.[218]

The ADA gives the FCC sufficient enforcement authority to ensure that relay services are provided everywhere in the nation and that minimum federal standards are met by relay service providers. The Act also provides for procedures to be established under which individual states may retain jurisdiction over the provision of intrastate telecommunication relay services by applying to the FCC for certification.[219] While complaints concerning alleged violations relating to the provision of intrastate services within a state with a certified program are to be filed with the FCC,[220] the FCC is required to refer such complaints to individual certified states.[221] The FCC cannot thereafter exercise jurisdiction over the complaint unless final action has not been taken by the certified state program within 180 days.[222]

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[212] ADA §401(a), 136 *Cong. Rec.* H4593 (July 12, 1990) (amending Section 225(d)(1) of the Communications Act).

[213] ADA §401(a), 136 *Cong. Rec.* H4593 (July 12, 1990) (amending Section 225(d)(1)(C) of the Communications Act).

[214] ADA §401(a), 136 *Cong. Rec.* H4593 (July 12, 1990) (amending Section 225(d)(1)(D) of the Communications Act).

[215] ADA §401(a), 136 *Cong. Rec.* H4593 (July 12, 1990) (amending Section 225(d)(1)(E) of the Communications Act).

[216] ADA §401(a), 136 *Cong. Rec.* H4593 (July 12, 1990) (amending Section 225(d)(1)(F) of the Communications Act).

[217] ADA §401(a), 136 *Cong. Rec.* H4593 (July 12, 1990) (amending Section 225(d)(1)(G) of the Communications Act).

[218] *See* Joint Explanatory Statement of the Committee of Conference, 136 *Cong. Rec.* H4604 (July 12, 1990).

[219] ADA §401(a), 136 *Cong. Rec.* H4593-94 (July 12, 1990) (amending Section 225(f) of the Communications Act).

[220] ADA §401(a), 136 *Cong. Rec.* H4593 (July 12, 1990) (amending Section 225(e)(2) of the Communications Act).

[221] ADA §401(a), 136 *Cong. Rec.* H4594 (July 12, 1990) (amending Section 225(g) of the Communications Act).

With respect to the issue of who is to bear the ultimate cost of such relay services, the ADA provides that the regulations to be promulgated by the FCC

> shall generally provide that costs caused by interstate telecommunications relay services shall be recovered from all subscribers for every interstate service and costs caused by intrastate telecommunications relay services shall be recovered from the intrastate jurisdiction. In a State that has a certified program under subsection (f), a State commission shall permit a common carrier to recover the costs incurred in providing intrastate telecommunications relay services by a method consistent with the requirements of this section.[223]

While the ADA will provide hearing-impaired people with access to the telephone, the Act will not provide broad access to television. The original version of the ADA would have required television broadcasters to take specified action to close caption television programs for hearing-impaired viewers (pursuant to which decoders portray written captions repeating the audio portions of a show). That section, too, was eliminated from the ADA in the spirit of compromise. Thus, hearing-impaired people remain severely disadvantaged by their inability to watch television in general.[224] As enacted, however, Title IX of the ADA does require amendment of the Communications Act to require closed captioning of all television public service announcements produced or funded by the federal government.[225]

VI. Miscellaneous

The ADA contains numerous miscellaneous provisions. Following are among the most significant of those provisions:

(1) States shall not be immune from actions under the ADA pursuant to the Eleventh Amendment.[226]

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[222] *Id.*

[223] ADA §401(a), 136 *Cong. Rec.* H4593 (July 12, 1990) (amending Section 225(d)(3)(B) of the Communications Act).

[224] For a discussion of this issue and of the recently enacted Television Decoder Circuitry Act of 1990, *see* section VI of chapter 7 of this text, *supra*.

[225] ADA §402, 136 *Cong. Rec.* H4594 (July 12, 1990) (amending Section 711 of the Communications Act).

[226] ADA §502, 136 *Cong. Rec.* H4594 (July 12, 1990). This section further provides:

> In any action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and at equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

(2) Courts and agencies have discretion to award attorneys' fees and litigation expenses (including the cost of expert witnesses) to prevailing parties (other than the United States) in actions under the Act.[227]

(3) Insurers are not prohibited in their ability to underwrite, classify or administer risks that are consistent with state law, nor are entities restricted in their ability to establish or observe the terms of *bona fide* benefit plans that are consistent with state law, as long as such insurance programs or benefit plans are not utilized to circumvent the intent of the Act.[228]

(4) Retaliation and coercion against an individual seeking to enforce his or her rights under the ADA is prohibited and subject to the same penalties imposed for other violations of the Act.[229]

(5) The Act shall not be construed to invalidate or limit the remedies, rights and procedures of any federal or state law that provides protection for individuals with disabilities that is greater than or equal to that provided under the ADA.[230]

(6) The Act shall not be construed to "preclude the prohibition of, or the imposition of restrictions on, smoking" in places of employment, public accommodation or transportation covered by the Act.[231]

(7) Within nine months after enactment of the Act, the ATBCB must issue minimum guidelines for purposes of Titles II and III of the Act.[232] Such guidelines "shall establish additional requirements, consistent with this Act, to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities."[233]

(8) Within 180 days of the Act's enactment, the Attorney General, in consultation with the chairs of the EEOC, the ATBCB and the FCC and the Secretary of Transportation, must develop and publish a plan to assist entities covered under this Act, and other Federal agencies, in understanding the responsibility of such entities and agencies under the Act.[234]

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[227] ADA §505, 136 *Cong. Rec.* H4594 (July 12, 1990). *See* H. Rep. No. 485, part 3, *supra* note 29, at 73. This provision would allow attorneys' fees to be awarded against both plaintiffs *and* defendants (other than the United States).

[228] ADA §501(c), 136 *Cong. Rec.* H4594 (July 12, 1990).

[229] ADA §503, 136 *Cong. Rec.* H4594 (July 12, 1990).

[230] ADA §501(b), 136 *Cong. Rec.* H4594 (July12, 1990).

[231] *Id.*

[232] ADA §504(a), 136 *Cong. Rec.* H4594 (July 12, 1990).

[233] ADA §504(b), 136 *Cong. Rec.* H4594 (July 12, 1990).

[234] ADA §506, 136 *Cong. Rec.* H4594-95 (July 12, 1990). In addition, each Federal agency that is determined to have responsibility for implementing the ADA is required to develop and disseminate technical assistance manuals (for use by persons and entities covered by the Act) within six months after

(9) Within one year of the Act's enactment, the National Wilderness Council on Disability must submit a report to Congress regarding "the effect that wilderness designations and wilderness land management practices have on the ability of individuals to use and enjoy the National Wilderness Preservation System. . . ."[235]

(10) The rights and protections of the ADA apply with respect to employment by the United States Senate and House of Representatives, and to the conduct of the Senate and the House of Representatives with respect to "matters other than employment."[236]

(11) Where appropriate, and to the extent authorized by law, the use of alternate means of dispute resolution (other than litigation) "is encouraged to resolve disputes arising under" the Act.[237]

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applicable regulations are published under Titles I through IV of the Act. ADA §506(c)(3), 136 *Cong. Rec.* H4595 (July 12, 1990).

[235] ADA §507, 136 *Cong. Rec.* H4595 (July 12, 1990).

[236] *See generally*, ADA §509, 136 *Cong. Rec.* H4595-96 (July 12, 1990).

[237] ADA §513, 136 *Cong. Rec.* H4596 (July 12, 1990). Suggested means of alternate dispute resolution include "settlement negotiations, conciliation, facilitation, mediation, factfinding, mini-trials, and arbitration. . . ."

13

Education for All Handicapped Children Act: Overview and Structure

I. Introduction

The Education for All Handicapped Children Act (EAHCA)[1] was enacted in 1975 to address the failure of state education systems to meet the educational needs of handicapped children in this country. The landmark case of *Brown v. Board of Education of Topeka*[2] established in 1954 that, regardless of race, all school children have a right to an equal education, but it took until 1975 for Congress to extend educational rights to handicapped children. Congress's enactment of the EAHCA was in part a response to two well-publicized court cases, *Mills v. Board of Education* and *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania* (PARC),[3] and the persistent efforts of persons with disabilities and organizations interested in the rights of persons with disabilities. In the congressional hearings leading to passage of the Act, note was also taken of studies analyzing the status of education for handicapped children throughout the nation.[4]

Some of the concerns that led Congress to enact the law are set forth in the general provisions of the EAHCA. Among these concerns were the facts that in the mid-1970s more than half of the approximately 8 million handicapped children in the nation were not receiving appropriate educational services,[5] one million of the nation's handicapped children were excluded entirely from public school educations,[6] and many handicapped children in regular school programs were educationally unsuccessful because their handicaps were undetected.[7] The purpose of the EAHCA was stated as follows:

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[1] Pub. L. No. 94-142, 20 U.S.C.A. §§1400-1485 (1990).

[2] 347 U.S. 483, 74 S. Ct. 686 (1954).

[3] 348 F. Supp. 866 (D.D.C. 1972), 1979-80 EHLR 551:643; 343 F. Supp. 279 (E.D. Pa. 1972). For a discussion of the *Mills* and *PARC* cases *see* chapter 2 of this text, *supra*.

[4] *See* S. Rep. No. 94-168, 94th Cong., 1st Sess. 20-21, reprinted in 1975 *U.S. Code Cong. and Admin. News* 1425.

> [T]o assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.[8]

The EAHCA contains eight subchapters (often referred to as Parts A-H). Subchapter I (commonly known as Part A)[9] contains the general provisions of the Act, including definitions. Subchapter II (commonly known as Part B)[10] sets forth the state formula grant program that requires each state receiving federal financial assistance under the Act to develop a state plan to ensure a free appropriate public education (FAPE) to all handicapped children residing in that state.

Subchapter II also contains the "heart" of the EAHCA—a series of procedural safeguards designed to protect the interests of handicapped children.[11] Rather than establishing substantive educational standards for all handicapped children, the Act relies heavily on procedural protections to reach its goals. Subchapter II is permanent and does not require reauthorization.

Subchapters III-VII[12] include discretionary grant programs that were enacted at various times in response to different concerns. Subchapter III[13] is concerned with funding regional resource centers to provide consultation, technical assistance and training services, as well as addressing special needs of particular groups of handicapped children. Subchapter IV[14] focuses on training personnel for educating handicapped children. Subchapter V[15] authorizes funding of research and demonstration projects to improve services for handicapped children. Subchapter VI[16] is designed to promote instructional media for handicapped persons, such as captioned films for deaf persons. Subchapter VII[17] is primarily concerned with advancing the use of new technology in the education of handicapped children. The discretionary programs contained in subchapters III-VII were not permanently authorized and thus do require reauthorization.

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[5] 20 U.S.C.A. §§1400(b)(1) and (3) (1990).

[6] 20 U.S.C.A. §1400(b)(4) (1990).

[7] 20 U.S.C.A. §1400(b)(5) (1990).

[8] 20 U.S.C.A. §1400(c) (1990).

[9] 20 U.S.C.A. §§1400-1408 (1990).

[10] 20 U.S.C.A. §§1411-1420 (1990).

[11] 20 U.S.C.A. §1415 (1990). *See also*, 20 U.S.C.A. §1411(f) (1990), which establishes the Secretary of the Interior as the authority for handicapped children on reservations served by schools operated by the Department of the Interior for Indian children. Pursuant to that authority the Secretary has issued regulations codified in 25 C.F.R. Part 45 (1989).

[12] 20 U.S.C.A. §§1421-1462 (1990).

[13] 20 U.S.C.A. §§1421-1427 (1990).

In 1986 the scope of the Act was expanded by legislative amendment.[18] This modification "amended the preschool incentive provision in Part B . . . to strengthen the incentive for States to develop preschool programs for children with disabilities from age 3 through age 5, with the goal of serving all such children by no later than fiscal year 1991."[19] The United States Department of Education has interpreted the amendment to prohibit states from limiting admission to a Part B program by applying a calendar cut-off date.[20] A handicapped child is automatically covered by the Act on his third birthday.[21]

Further, the 1986 amendment established the new subchapter VIII (commonly known as Part H)[22] of the Act. Subchapter VIII authorized federal formula grants to states for the development and implementation of statewide systems to provide early intervention services for handicapped infants and toddlers. A participating state has five years to phase in its early intervention system. This subchapter is authorized through fiscal year 1991.

The primary focus of this chapter of the text will be to provide an overview of subchapters II and VIII (Parts B and H) of the EAHCA. The areas of subchapter II that will be reviewed include a brief description of the federal enforcement scheme, definitions of terminology and concepts that will be relevant to later chapters, and a more detailed review of the prescribed procedural safeguards. An overview of rights to confidentiality of and access to educational records, application of the Act to *all* handicapped children, and the extent of rights to participate in extracurricular activities will also be addressed. The discussion of subchapter VIII will focus on the manner in which the Act addresses handicapped children ages zero through two years old differently from handicapped children ages three and above.

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[14] 20 U.S.C.A. §§1431-1435 (1990).

[15] 20 U.S.C.A. §§1441-1444 (1990).

[16] 20 U.S.C.A. §§1451-1454 (1990).

[17] 20 U.S.C.A. §§1461-1462 (1990).

[18] Pub. L. No. 99-457, 100 Stat. 1145-1177, 1986 *U.S. Code Cong. and Admin. News:* Vol. 1.

[19] S. Rep. No. 204, 101st Cong., 1st Sess. 2 (1989).

[20] OSEP Policy Memorandum 90-16, 16 EHLR 859 (1990).

[21] *Id.*

[22] 20 U.S.C.A. §§1471-1485 (1990).

II. Federal Enforcement

A. State Plans and Eligibility for Federal Funds

Any state seeking to obtain funds pursuant to the EAHCA must submit a state plan to the United States Secretary of Education.[23] That plan must set forth goals, timetables and descriptive information concerning the facilities, personnel and services needed to meet the goal of full educational opportunity for all handicapped children.[24] In the event that the Secretary of Education intends to disapprove any state plan, he or she must provide the state with reasonable notice and an opportunity for a hearing prior to such disapproval.[25]

In order for a state to receive or continue to receive federal funding under the EAHCA, it must demonstrate the existence of several factors to the United States Secretary of Education. One is that the state has a policy assuring all handicapped children the right to a FAPE.[26] Others are that the state has submitted a plan to the federal government setting forth policies and procedures that are designed to assure that monies received are expended in a manner consistent with the EAHCA,[27] that the state's educational plan includes procedural safeguards as required by EAHCA,[28] that the state plan contains procedures to assure that to the maximum extent appropriate handicapped children are educated with children who are not handicapped,[29] and that the state plan contains procedures to assure that testing and evaluation materials and procedures are both selected and administered so as not to be racially or culturally discriminatory.[30] The responsibility for ensuring that the eligibility requirements for federal funding are met belongs to the appropriate State Education Agency (SEA), which must determine whether the state's proclaimed standards and plans meet the agency's educational standards and requirements.[31] A state that does not satisfy these requirements will not receive or will lose the right to receive federal funding for its educational programs.

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[23] 20 U.S.C.A. §1413 (1990). For schools operated by the Department of the Interior for Indian children on reservations, 20 U.S.C.A. §1411(f) (1990) provides that the Secretary of the Interior must submit a satisfactory application to the Secretary of Education.

[24] A state's responsibility to provide full educational opportunity extends to *all* handicapped children residing within the state—except for those children who are in the state solely for purposes of attending an educational program. *Rabinowitz v. New Jersey State Board of Education*, 550 F. Supp. 481 (D.N.J. 1982), 1982-83 EHLR 554:229 (where handicapped child's presence in state was not for purposes of obtaining an education, state had obligation to implement EAHCA for handicapped child residing therein, despite the fact that the child's parents resided—and were domiciled—in another state); *Sonya C. v. Arizona School for the Deaf and Blind*, No. CIV 89-099, slip op. (D. Ariz. July 23, 1990) (handicapped child whose parents lived in Mexico but who resided with legal guardians in Arizona was entitled to receive appropriate education from the state of Arizona under the EAHCA).

[25] 20 U.S.C.A. §1413(c) (1990).

[26] 20 U.S.C.A. §1412(1) (1990).

[27] 20 U.S.C.A. §1412(2) (1990).

[28] 20 U.S.C.A. §1412(5)(A) (1990).

[29] 20 U.S.C.A. §1412(5)(B) (1990).

B. Remedies

Once federal monies have been disbursed to a state, if the Secretary of Education subsequently finds that the state has failed to comply substantially with the requirements of the EAHCA, the Secretary may withhold further payments for certain specified programs "to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children."[32] In other words, whatever programmatic funds still remain to be disbursed may be withheld. Such a decision by the Secretary of Education is subject to judicial review, but the Secretary's findings of fact may not be overturned unless "good cause" is shown. Good cause is defined as requiring a judicial finding that the Secretary's decision was not supported by substantial evidence.[33]

III. Terminology and Concepts

A. Handicapped Children

Not all children with disabilities are covered by the EAHCA: rather, only those handicapped children who are *educationally* handicapped fall within the scope of the Act. The EAHCA lists those handicaps that are recognizable as educational handicaps. The listing, which is intended to be exhaustive, addresses those children who are "mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired . . . , or children with specific learning disabilities, who by reason thereof require special education and related services."[34]

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[30] 20 U.S.C.A. §1412(5)(C) (1990).

[31] 20 U.S.C.A. §1412(6) (1990).

[32] 20 U.S.C.A. §1416(a) (1990).

[33] 20 U.S.C.A. §1416(b)(2) (1990).

[34] 20 U.S.C.A. §1401(a)(1) (1990). For the definition of specific learning disabilities, *see* section III H of this chapter, *infra*.

Although not specifically mentioned in the definition of "handicapped children," many states have utilized the term "multiply handicapped" (or a derivative thereof) to describe children with two or more recognizable handicaps. The synonymous term "multihandicapped," although not appearing in the statute, is defined in the regulations, as are the cited handicapping conditions.[35]

By definition, therefore, in order to be covered by the Act a child must require "special education and related services."[36] A child with a minor limb disorder who does not need special attention in the educational setting, for example, would not qualify under this definition.

B. Special Education

The term "special education" is defined as "specially designed instruction . . . to meet the unique needs of a handicapped child. . . ."[37] It is the combination of being specially designed and meeting the unique needs of a given child that makes special education "special." In most states, special education can be provided only by a certified special education teacher; the EAHCA, however, does not contain such a proviso.

Special education cannot be labeled by a precise definition because of its child-specific character. The implications of the statutory definition, however, are significant. One clear ramification is that special education is not limited to traditional academic instruction in the classroom. While special education can be provided in the classroom, it can also be provided in a physical education classroom, at home, or in a hospital or other institution.[38]

Special education can be related to, and in support of, regular academic instruction, it can also include vocational instruction,[39] or it can focus upon daily living skills, community living skills, pre-vocational skills or whatever is appropriate for the particular child in question. Thus, the nature of special education instruction will vary as required to address the individual child's needs. One of the primary guides to this variation is the degree of the child's disability (mild, moderate or severe).

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[35] 34 C.F.R. §300.5 (1988). The term "multihandicapped" means two or more handicaps which, in combination cause "such severe educational problems that they cannot be accommodated in special education programs solely for one of the impairments." [Note that deaf-blind children are expressly excluded from the definition of "multihandicapped."]

[36] 20 U.S.C.A. §1401(a)(1) (1990).

[37] 20 U.S.C.A. §1401(a)(16) (1990).

[38] 34 C.F.R. §300.14(a)(1) (1988).

[39] 34 C.F.R. §300.14(a)(3) (1988).

C. Related Services

"Related services" under the Act are defined as including transportation and developmental, corrective and other supportive services designed to assist the handicapped child in benefiting from special education.[40] Related services also include speech pathology, audiology, physical therapy, occupational therapy, recreation, counseling, psychological services, and medical services provided solely for diagnostic and evaluative purposes.[41] This listing of related services is not intended to be exhaustive and other services may therefore be included or required under this category.[42]

D. Free Appropriate Public Education

A "free appropriate public education" (FAPE), as defined under the Act, comprises special education and/or related services provided at public expense that meet the standards of the State Educational Agency (SEA) and that are provided in conformance with the Individualized Education Program devised for each handicapped child.[43]

E. Individualized Education Program

The "individualized education program" (IEP)[44] is the cornerstone of the EAHCA. This document, which ideally is developed in a collaborative and cooperative effort between parents and school personnel, describes the handicapped child's abilities and needs and prescribes the placement and services designed to meet that child's unique needs. The IEP is not only a document—it is also the culmination of a prescribed process. It has thus substantially altered the means by which educators plan programming for handicapped children. Educators must now work with parents, who are mandatory participants in this planning process and who are provided with procedural safeguards in the event that they disagree with the educators responsible for educating their children.[45]

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[40] 20 U.S.C.A. §1401(a)(17) (1990).

[41] *Id.*

[42] *See, e.g. Irving Independent School District v. Tatro*, 468 U.S. 883, 104 S. Ct. 3371 (1984), 1983-84 EHLR 555:511 (clean intermittent catheterization, needed to enable child to attend school, is a related service). For a comprehensive discussion of related services, *see* chapter 16 of this text, *infra*.

[43] 20 U.S.C.A. §1401(a)(18) (1990).

[44] 20 U.S.C.A. §1401(a)(19) (1990).

[45] *See* both section IV A of this chapter and chapter 18, *infra*, for more detailed discussions of the parental role and procedural safeguards involved in developing an IEP.

In order for an IEP to comply with the law, it must have been developed and implemented in accordance with detailed, legally mandated procedures.[46] The written program must include a statement of the child's present levels of educational performance, of annual goals for the child (including short-term instructional objectives), of specific educational services to be provided to the child, and of the extent to which the child will be able to participate in regular educational programs. The IEP must specify projected dates for initiation of services and for the anticipated duration of such services, and it must include objective criteria and evaluation procedures and schedules for determining, at least annually, whether the stated instructional objectives are being achieved.

F. Least Restrictive Environment

Each handicapped child must be educated in the least restrictive environment (LRE) appropriate to meet his or her needs.[47] A handicapped child is to be removed from the regular educational environment only when "the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."[48]

The terms "least restrictive environment" and "mainstreaming" are sometimes thought to be synonymous, but such an interpretation is incorrect. The term "mainstreaming," which does not actually appear as a formal term in the EAHCA, has become common jargon in the educational community. It is typically accepted as meaning the placement of a handicapped child in a regular education setting. Such mainstreaming can be achieved in all aspects of a child's educational program or in just some portions of that program, such as in a particular academic class, in a special area of instruction such as art, music or physical education, or simply in the cafeteria at lunchtime.

The concept of least restrictive environment is considerably broader than the concept of mainstreaming, however. A handicapped child who can be mainstreamed for only part of the day can be in a less or more restrictive environment than a similarly situated child. If, for instance, one child is mainstreamed for one hour per day and another for two hours per day, the latter child, all other factors being equal, is in a less restrictive environment.

Where severely handicapped children who cannot be mainstreamed at all are at issue, less and more restrictive placements may be available. A handicapped child in a self-contained classroom consisting of twelve students to one teacher, for example, can be said to be in a less restrictive environment than a child in a self-contained classroom with twelve students to one teacher and one aide, or than a child in a self-contained classroom with six students to one teacher and one aide.[49] This latter classroom placement would be considered the most restrictive of the three placements just described. The more intensive staffing ratio (12:1, 12:1:1, 6:1:1) makes it more restrictive.

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[46] 34 C.F.R. §§300.340-300.349 (1988).

[47] 34 C.F.R. §300.550 (1988). *See* chapter 16 of this text, *infra*, for a more detailed discussion of least restrictive environment.

[48] 34 C.F.R. §300.550(b)(2) (1988).

Mainstreaming, therefore, is only one part of the larger concept of least restrictive environment. The distinction between mainstreaming and LRE is particularly highlighted whenever parents or educators grapple with incorporating the concept of "integrated education" into an IEP.[50]

G. Local Educational Agency

The Local Educational Agency (LEA) is the term utilized in the EAHCA to describe the public board of education or other public authority that exercises administrative control or direction over public elementary and/or secondary schools in a political subdivision.[51]

H. Specific Learning Disabilities

Children with specific learning disabilities are defined as:

> those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual,

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[49] Other examples are numerous. A child in a self-contained classroom in a regular school building, even with no formal mainstreaming cited in his IEP, is in a less restrictive environment than a similar child in a self-contained classroom in a segregated building. Other examples of progressively more restrictive environments (or placements) are a special day school (public or private), a residential school, or a hospital or institution. Home instruction presumably fits somewhere between a special day school and a hospital or institution.

[50] "Integrated education" involves placement of a handicapped child primarily in the regular education classroom. In contrast to mainstreaming, however, the handicapped child in an integrated educational setting is not expected to keep pace with the non-handicapped children in the class; nor is the handicapped child expected to achieve all of the regular educational requirements in order to be placed into the next grade level. Rather, the handicapped child is to be provided an adapted curriculum and to move on to the next grade level if he or she achieves enough success as measured against his or her own IEP. Proponents of integrated education believe that the regular education milieu is of critical importance to handicapped children and should be given preeminence in devising IEPs.

[51] 20 U.S.C.A. §1401(a)(8) (1990). Although each LEA is responsible for ensuring that a FAPE is provided for all handicapped children residing within its geographical boundaries, the residence of a child is a matter of state, not federal, law. *See, e.g., Catlin v. Sobol*, 553 N.Y.S. 2d 501 (App. Div. 1990) (under state law, handicapped student is a resident of the school district in which his "family home at board" is located, not the district in which his parents reside).

> hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.[52]

In other words, a child with a learning disability is one who has a disability in understanding or using language, based upon a psychological processing disorder.

This definition is carefully crafted to preclude learning disabilities from being used as a catch-all for too many children. On the one hand, if a child's language deficiency is due to another identifiable handicap (deafness, for example), the child should be classified as having that other handicap (being deaf). On the other hand, a child with educational difficulties that are attributable to environmental, cultural, or economic disadvantages may indeed need additional assistance, but such a child is not learning disabled and thus is not handicapped within the meaning of the EAHCA.

Because of the difficulties in evaluating and determining a learning disability (and due to a concern for the open-ended potential of implementing such a definition), additional steps are required in the process of evaluating children for a specific learning disability.[53] These steps include: (a) the involvement of additional members on the multidisciplinary evaluation team,[54] (b) a determination by the multidisciplinary evaluation team that the child's achievement is not commensurate with his or her age and ability levels in defined skill areas, and that this achievement is severely inconsistent with the child's intellectual ability,[55] and (c) observation of the child's academic performance in the regular classroom by at least one multidisciplinary team member (other than the child's teacher).[56] In addition, the multidisciplinary evaluation team must write a specifically detailed report in which each team member certifies whether the report reflects his or her conclusions. If a team member feels the report does not do so, he or she must submit a separate statement presenting his or her independent conclusions.[57]

IV. Procedural Safeguards

A. Development of an Individualized Education Program

In an effort to maximize the likelihood of providing an appropriate education for each handicapped child, the EAHCA has established a procedure requiring input from and discussion among both professionals and parents of the child. Ideally these parties act as partners in a good faith effort designed to meet the needs of each handicapped child. The EAHCA places considerable weight upon the process used to develop the IEP.[58]

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[52] 20 U.S.C.A. §1401(a)(15) (1990).

[53] 34 C.F.R. §§300.540-300.543 (1988).

[54] 34 C.F.R. §300.540 (1988).

[55] 34 C.F.R. §300.541 (1988).

[56] 34 C.F.R. §300.542 (1988).

[57] 34 C.F.R. §300.543 (1988).

The sequence of events typically commences when someone (a professional or a parent) suspects that a child is handicapped. The LEA must provide a detailed notice to the child's parents and then seek to obtain consent from the parents to conduct an evaluation of the child. After this evaluation is complete, a meeting is held to determine whether the child should be classified as handicapped and, if so, what placement and services should be provided in order to furnish the child with a FAPE. This information, and more, is included in the child's IEP.

Before a school district (or educational agency) may propose to initiate or change the identification, evaluation or educational placement of a child, the school district (or agency) must first provide notice, in writing, to the child's parents.[59] Similar notice is required before a school district may refuse to initiate or change the identification, evaluation or educational placement of a child.[60] This notice must fully explain all procedural safeguards and must contain, among other things, descriptive information concerning the proposed action or refusal to act by the school district.[61] Further, the notice must be understandable to the general public and be provided in the native language or other mode of communication used by the parent, unless this is clearly not feasible.[62] Similar notice is required with respect to a proposal to initiate or change—or a refusal to initiate or change—the provision of a FAPE to a child.

Parental consent must be obtained before a preplacement evaluation is conducted and a handicapped child is initially placed in a special education program.[63] If the parent refuses to provide consent, state law governs the manner in which the public agency can pursue overriding the parent's refusal. In the absence of any state law on this point, the due process hearing procedure discussed below in Subsection B can be utilized by the public agency to obtain authority to evaluate the child.[64]

After the evaluation is concluded, the next step is to hold a meeting attended by certain mandated participants. Both the school district and the child's parents or guardians are to be represented. Participants on behalf of the school district (or public agency) must include both an individual who is qualified to provide or supervise the provision of special education and the child's teacher. Further, if the meeting involves a child who has been evaluated for the first time, a member of the evaluation team or a representative of the public agency who is knowledgeable about the evaluation procedures utilized for the child must be present.[65] This person must also be familiar with the results of the child's evaluation. Both the child, where appropriate, and one or both of the child's parents are also to be involved in the IEP meeting. At the discretion of the parent or agency other persons may also be present.

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[58] *See, e.g.*, *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982), 1981-82 EHLR 553:656.

[59] 34 C.F.R. §300.504(a)(1) (1988).

[60] 34 C.F.R. §300.504(a)(2) (1988).

[61] 34 C.F.R. §§300.504(a) and 300.505 (1988).

[62] *Id.*

[63] 34 C.F.R. §300.504(b) (1988).

[64] 34 C.F.R. §300.504 (c)(2)(i) (1988).

The public agency must ensure that one or both parents are afforded an opportunity to participate in the IEP meeting.[66] Sufficient notice must be provided to the parents to allow them time to arrange to be present.[67] The meeting must be scheduled at a mutually agreed-upon time and place.[68] In the event the parents cannot otherwise participate in the meeting, telephone conference calls are permissible.[69] The public agency may conduct the meeting without the presence of the parent only if the agency has made and recorded its unsuccessful attempts to arrange a mutually agreed-upon time and place for the meeting.[70]

B. Due Process Hearings

When a parent and a public education agency disagree concerning any of these matters—the identification, evaluation, educational placement or provision of a FAPE—for a handicapped child, or for a child suspected of being handicapped, either party may initiate a "due process hearing."[71] The due process hearing will be conducted either by the public agency directly responsible for the child's education (usually the LEA) or by the SEA. State law determines which level of government is responsible for conducting the hearing.[72]

The due process hearing must be conducted by an "impartial" hearing officer. Thus, the hearing officer may not be employed by the public agency involved in educating the child and may not have any other apparent conflict of interest with respect to the proceeding.[73] The parties to the hearing have a right to counsel and traditional due process rights to present evidence, confront and cross-examine witnesses (as well as to compel the attendance of witnesses) and obtain a verbatim record of the hearing.[74] Either party may prohibit the production of any evidence that has not been disclosed to that party at least five days before the hearing.[75] The hearing officer's decision must be in writing and must include written findings of fact.[76] Because the EAHCA is silent concerning any rules of evidence, each state is free to define its own rules in that regard.

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[65] 34 C.F.R. §300.344 (1988).

[66] 34 C.F.R. §300.345 (1988).

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] 34 C.F.R. §300.506 (1988).

[72] 20 U.S.C.A. §1415(b)(2) (1990).

The hearing officer must reach a final decision within 45 days after receipt of the request for a hearing.[77] In those states that provide for a hearing at the local level,[78] the losing party may appeal to the SEA.[79] For those states in which an administrative appeal lies with the SEA, the appellate administrative decision must be rendered within 30 days of receipt of a request for review.[80] The decision at the state level (either the hearing officer's decision in a one-tier administrative procedure or the appellate decision in a two-tier administrative procedure) may be appealed by commencement of a civil action in either state or federal court.[81] At this point in the process the court is not limited to the administrative record; it may receive additional evidence.[82] The court's decision to affirm or reverse the administrative decision will be based on a preponderance of the evidence.[83]

C. The "Stay-Put" Provision

In recognition of the fact that continuity and stability, although beneficial to all children, are particularly important to handicapped children, the EAHCA includes a mechanism called the "stay-put" provision. If the mere proposal of a change in placement were sufficient to require implementation of the proposed change, the child could become subject to a "yo-yo" effect. Frequent changes would occur, with the possibility that a child could be shuttled back and forth between alternative placements. This type of system would also be unmanageable.

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[73] 34 C.F.R. §300.507 (1988).

[74] 20 U.S.C.A. §1415(d) (1990); 34 C.F.R. §300.508 (1988).

[75] 34 C.F.R. §300.508(a)(3) (1990).

[76] 20 U.S.C.A. §1415(d) (1990); 34 C.F.R. §300.508 (1988).

[77] 34 C.F.R. §300.512 (1988).

[78] *See* footnote 72, *supra*.

[79] 20 U.S.C.A. §1415(c) (1990); 34 C.F.R. §300.510 (1988).

[80] 34 C.F.R. §300.512 (1988).

[81] 34 C.F.R. §300.511 (1988).

[82] 20 U.S.C.A. §1415(e)(2) (1990).

[83] *Id.* A preponderance of the evidence means that the weight of the evidence in favor of the party who prevails is greater than the weight of the evidence in support of the position taken by the opposing party.

Accordingly, when the LEA and the parents of a handicapped child disagree about a proposed change in the child's educational placement, the child must remain in his or her "present educational placement" while an administrative dispute or subsequent judicial proceeding is pending.[84] The term "present educational placement" means the placement in which the child was being educated prior to consideration of the change that forms the basis for the disagreement between the agency and the parent. Particularly difficult problems arise when the "present educational placement" no longer exists, either due to the actions of the public agency or as a result of outside forces.[85]

Despite this stay-put provision, the public agency and parents can always agree to change the placement provided to the child (without prejudice to either party's position) while the parties proceed with their dispute. If the dispute relates to initial admission to public school, the child, with the consent of the parents, is placed in the regular public school program until completion of all proceedings.[86]

The public agency has a responsibility to assign an individual to act as a surrogate parent in the event that no parent can be identified for the child in question. The procedures for appointment of surrogate parents are a matter of state law. The surrogate parent is imbued with the rights of a parent concerning all matters relating to the identification, evaluation, and educational placement of the child.[87]

V. Confidentiality of and Access to Records

Parents of handicapped children are entitled to an opportunity to inspect and review all educational records relating to the identification, evaluation and placement of their child, and all records related to the provision of a FAPE for their child.[88] The educational agency must comply with a parental request without unnecessary delay and before any IEP meeting, but in no case may the public agency take more than 45 days to respond to a request.[89]

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[84] 34 C.F.R. §300.513 (1988).

[85] For a discussion of such difficulties, *see* chapter 14 of this text, *infra*.

[86] 34 C.F.R. §300.513(b) (1988).

[87] 34 C.F.R. §300.514 (1988).

[88] 34 C.F.R. §300.502 (1988).

[89] 34 C.F.R. §300.562 (1988).

Parents also have the right to request copies of their child's educational records. The educational agency may charge a reasonable fee for copies, but it may not charge a fee to search for or retrieve information.[90]

Any parent who believes that information in their child's educational records is inaccurate or misleading, or violates the privacy or other rights of the child, may request that the education agency amend the information.[91] In the event that the agency declines to amend the information, the parent has a right to a hearing,[92] conducted by the education agency. If the parent prevails, the records must be amended.[93] If the parent does not prevail, he or she can place a statement in the child's records commenting on the challenged information.[94]

Information contained in a child's educational records is confidential. It cannot be shared with outside parties unless the consent of the parent is first obtained or the outside party is a specifically delineated agency (such as another school or school system in which the student seeks or intends to enroll, the United States Secretary of Education, the SEA, state or local officials, or an authority to whom information is required to be reported or disclosed pursuant to state statute adopted prior to November 19, 1974).[95] The access and confidentiality rights promulgated pursuant to the EAHCA[96] are very similar in scope and nature to the regulations promulgated pursuant to the Family Educational Rights and Privacy Act (FERPA).[97]

VI. "Zero Reject" Principle

The EAHCA is premised on a "zero reject" principle. This concept assumes that *all* handicapped children, regardless of the severity of their handicaps, are entitled to receive a FAPE. Thus, it has been held that the EAHCA constitutes an "unequivocal congressional directive to provide an appropriate education for all children regardless of the severity of the handicap," and that "[t]he language and the legislative history of the [EAHCA] simply do not entertain the possibility that some children may be untrainable."[98]

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[90] 34 C.F.R. §300.566 (1988).

[91] 34 C.F.R. §300.567 (1988).

[92] 34 C.F.R. §300.568 (1988).

[93] 34 C.F.R. §300.569 (1988).

[94] *Id.*

[95] 34 C.F.R. §99.31 (1989).

[96] 34 C.F.R. §§ 300.560-573 (1988). *See also, Webster Groves School District v. Pulitzer Publishing Co.*, 898 F.2d 1371 (8th Cir. 1990) (upon request of student's guardian, court properly closed the courtroom and sealed court file in a judicial proceeding pursuant to the EAHCA).

[97] 20 U.S.C.A. §1232g (1990); 34 C.F.R. Part 99 (1989). FERPA applies to all students, not just children who are handicapped.

This issue received some publicity when, in *Timothy W. v. Rochester, New Hampshire School District*, a court upheld a school district's claim that the EAHCA did not require the district to provide educational services for a multihandicapped child who was allegedly unable to "benefit" from special education.[99] That decision was reversed on appeal.[100] The First Circuit followed the generally acknowledged understanding of the EAHCA in holding that the EAHCA "makes clear that a 'zero reject' policy is at the core of the Act,"[101] and that there is no requirement under the Act "that a handicapped child must demonstrate that he or she will 'benefit' from the educational program."[102] The First Circuit in *Timothy W.* set forth a detailed analysis of the issue, which runs the gamut from the title of the Act[103] through its statutory language[104] and legislative history (as well as amendments),[105] and concludes with a comprehensive analysis of related case law.[106]

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[98] *Kruelle v. New Castle County School District* 642 F.2d 687, 695 (3d Cir. 1981), 1980-81 EHLR 552:350, 355. *See also*, *Gladys J. v. Pearland Independent School District*, 520 F. Supp. 869, 879 (S.D. Tex. 1981), 1980-81 EHLR 552:480, 486 ("[t]he language and the legislative history of the [EAHCA] simply do not entertain the possibility that some children may be beyond the reach of our educational expertise").

[99] 1987-88 EHLR 559:480 (D.N.H. 1988).

[100] *Timothy W. v. Rochester, New Hampshire School District*, 875 F.2d 954 (1st Cir. 1989), 15 EHLR 441:393.

[101] 875 F.2d at 960, 15 EHLR at 441:397.

[102] *Id.*

[103] *See* 875 F.2d at 959, 15 EHLR at 441:396, where the First Circuit notes that the Act is entitled "The Education for *All* Handicapped Children Act."

[104] *See* 875 F.2d at 960, 15 EHLR at 441:397, for a discussion of repeated references in the EAHCA to *all* handicapped children (*e.g.*, 20 U.S.C.A. §1412(1), 20 U.S.C.A. §1412(2)(A), (B) and (C) (1990), 20 U.S.C.A. §1418(a) (1990) and (c) and to serving severely handicapped children (*e.g.*, 20 U.S.C.A. §1412(2)(C) (1990) and 20 U.S.C.A. §1412(3) (1990)).

[105] *See* 875 F.2d at 962-64, 15 EHLR 441:398-400, for a discussion of the fact that the purpose of enacting the EAHCA was to end exclusion of handicapped children from educational services, and for references to congressional comments referring to serving all children, including those who are severely handicapped.

[106] *See* the court's discussion at 875 F.2d at 968-72, 15 EHLR 441:403-06, concerning *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania* (PARC), 343 F. Supp. 279 (E.D. Pa. 1972), and *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), 1979-80 EHLR 551:643 (exclusion is unconstitutional); *Kruelle v. New Castle County School District*, 642 F.2d 687 (3d Cir. 1981), 1980-81 EHLR 552:350; *Gladys J. v. Pearland Independent School District*, 520 F. Supp. 869 (S.D. Tex. 1981), 1980-81 EHLR 552:480; *Garrity v. Gallen*, 522 F. Supp. 171 (D.N.H. 1981), 1981-82 EHLR 553:151, *aff'd*, 697 F.2d 452 (1st Cir. 1983); *Battle v. Commonwealth of Pennsylvania*, 629 F.2d. 269, 275 (3d Cir. 1980), 1979-80 EHLR 551:647, *cert. denied*, 452 U.S. 968, (1981) (severity of handicap not relevant to eligibility for services); *Polk v. Central Susquehanna*

Although the language and holding in *Timothy W.* seem to indicate clearly that no handicapped child is to be excluded from the benefits and protections of the EAHCA, there still remains a lingering question as to whether courts may find that a child can be too severely handicapped to be covered by the Act. The First Circuit clearly held in *Timothy W.* that very severely handicapped children are covered by the EAHCA. Timothy is multiply handicapped and profoundly mentally retarded and suffers from, among other disabilities, spastic quadriplegia, cerebral palsy, seizure disorder and cortical blindness.[107] In that case, however, the court noted that there was considerable evidence that Timothy "is aware of his surrounding environment, makes or attempts to make purposeful movements, responds to tactile stimulation, responds to his mother's voice and touch, recognizes familiar voices, responds to noises, and parts his lips when spoon fed."[108] The question is, would courts find the EAHCA applicable in situations in which, unlike that involving Timothy, a child is not aware of his surroundings?

In *Timothy W.*, the First Circuit referred to *Parks v. Pavkovic*,[109] and noted that in *Parks* the Seventh Circuit "*speculated* that in the *hypothetical* case of a child in a *coma*" the child might be uneducable.[110] The First Circuit held that that dictum in the *Parks* case was irrelevant to the situation involving Timothy W., because Timothy was *not* in a coma. It remains unclear, therefore, whether the First Circuit would treat a child in a coma differently than it treated Timothy, or whether other courts will draw a line at some point to hold some children "uneducable" and thus not entitled to special education services under the EAHCA. The history of the Act, however, and case law interpreting the Act, as explained fully in *Timothy W.*, clearly disparage such an interpretation.

VII. Extracurricular Activities

In addition to traditional educational opportunities, the regulations pursuant to the EAHCA (34 C.F.R. §300.306) provide:

Intermediate Unit 16, 853 F.2d 171, 176, 183 (3d Cir. 1988), 15 EHLR 441:130; *DeLeon v. Susquehanna Community School District*, 747 F.2d 149, 153 (3d Cir. 1984), 1984-85 EHLR 556:260; *Abrahamson v. Hershman*, 701 F.2d 223, 228 (1st Cir. 1983), 1982-83 EHLR 554:403; *Campbell v. Talladega County Board of Education*, 518 F. Supp. 47, 50 (N.D. Ala. 1981), 1980-81 EHLR 552:472, *North v. District of Columbia Board of Education*, 471 F. Supp. 136, 144 (D.D.C. 1979); and distinguishing the cases relied upon by the lower court: *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982), 1980-81 EHLR 553:656, *Matthews v. Campbell*, 1979-80 EHLR 551:264 (E.D. Va. 1979), and *Parks v. Pavkovic*, 753 F.2d 1397 (7th Cir. 1985), 1984-85 EHLR 556:373.

[107] 875 F.2d at 956, 15 EHLR at 441:393-394.

[108] 875 F.2d at 962, 15 EHLR at 441:398.

[109] 753 F.2d 1397 (7th Cir. 1985), 1984-85 EHLR 556:373, cited at 875 F.2d at 970, 15 EHLR at 441:404.

[110] 875 F.2d at 970, 15 EHLR at 441:404 (emphasis in original).

> Each public agency shall take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped children an equal opportunity for participation in those services and activities.

This strong language was challenged in *Rettig v. Kent City School District.*[111] In that case, the state-appointed hearing officer sided with the LEA in ruling that a handicapped child, Thomas Rettig, was not entitled to participate in an extracurricular program.[112] The hearing officer found "that because of Thomas' 'sporadic and recurring behavior, including regurgitation, lack of interest, self-stimulating activities and bladder accidents,' he was unable to significantly benefit from extracurricular programs."[113] The Sixth Circuit in *Rettig* opined that the EAHCA regulation conflicted with the Supreme Court's directive in *Board of Education of the Hendrick Hudson Central School District v. Rowley.*[114] Since the Supreme Court in *Rowley* declined to read an equality standard into the EAHCA, but applied a substantive standard requiring an IEP that is reasonably calculated to enable the child to receive some educational benefit, the Sixth Circuit concluded that the regulation improperly required strict equality of opportunity.

As a result of *Rettig*, the vitality of 34 C.F.R. §300.306 has been called into question. There has been very little case law on this issue, but if *Rettig* is followed outside the Sixth Circuit the determination of access to extracurricular activities will have to be made on a case-by-case basis. Presumably the focus will be upon what, if any, benefits the child will derive from such participation.

In the opinion of the authors, sole reliance upon the *Rowley* standard—which looks at the IEP as a whole—would result in few, if any, handicapped students being entitled to participate in extracurricular activities. Although the *Rettig* court may have implicitly considered the Act's least restrictive environment mandate when denying participation to Thomas, an explicit analysis of various alternative extracurricular programs and consideration of potential modifications and support services appear necessary.[115] Moreover, in a given case, to the extent that the EAHCA is determined not to require participation in an extracurricular program,[116] the parties (or court) must analyze the LEA's responsibilities under Section 504: The LEA must consider reasonable accommodations to determine whether the child is otherwise qualified.[117]

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[111] 788 F.2d 328 (6th Cir 1986), 1985-86 EHLR 557:308.

[112] No particular extracurricular activity was in dispute. The district court held that Thomas was entitled to one hour of extracurricular activities per week. 539 F. Supp. 768 (N.D. Ohio 1981), 1980-81 EHLR 552:503.

[113] 788 F.2d at 332, 1985-86 EHLR at 557:311.

[114] 458 U.S. 176, 102 S. Ct. 3034 (1982), 1981-82 EHLR 553:656. For a more detailed discussion of this case and its holding, *see* chapter 16 of this text, *infra*.

[115] For a detailed description of appropriateness and least restrictive environment, *see* chapter 16 of this text, *infra*.

When an LEA is faced with a decision regarding whether to provide a handicapped child with access to an extracurricular activity, safety is a legitimate concern, particularly if the activity at issue is an athletic endeavor. In such a situation, the LEA should make sure to involve individuals in the deliberative process who have specific expertise concerning that issue.[118] Automatic exclusion of handicapped children on the basis that children with such handicaps have never before participated in the extracurricular activity at issue is not justifiable.

VIII. Handicapped Infants and Toddlers

The provisions of Part B of the EAHCA apply to handicapped children ages 3 to 21 (unless a handicapped child has legally and voluntarily dropped out of school or obtained a diploma). Amendments to the EAHCA passed in 1986 as part of Public Law 99-457 provide for incentive grants to those states that submit plans approved by the United States Secretary of Education and provide special education and related services to handicapped children ages three to five, inclusive.[119]

Public Law 99-457 also established a Part H (Section VIII)[120] to the EAHCA to protect the interests of handicapped infants and toddlers. This enactment requires a statewide system of coordinated, comprehensive, multidisciplinary, interagency programs providing appropriate early intervention services by the beginning of the fifth year of a state's participation under Part H.[121] When enacting this legislation, Congress recognized that early intervention enhances the development of handicapped infants, minimizes their potential for developmental delay, reduces overall educational costs, enhances the capacity of families to meet the special needs of their handicapped infants and toddlers, minimizes the likelihood of the institutionalization of such children, and maximizes the potential for handicapped individuals eventually to live independently in society.[122]

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[116] 34 C.F.R. §300.306 (1988) does not require equal participation, but rather "equal *opportunity* for participation" (emphasis added).

[117] *See* discussion in chapters 5 and 6 of this text, *supra*.

[118] *See, e.g., Hollenbeck v. Board of Education of Rochelle Township*, 699 F. Supp. 658 (N.D. Ill. 1988), 15 EHLR 441:281 (LEA's failure to permit parent to present experts to multidisciplinary team considering the safety of a wheelchair-bound student's participation in track and field violated 34 C.F.R. §300.344 (a)(5): the student could not be excluded from participation in the regular extracurricular activity without input from experts concerning the safety issue at hand).

[119] 20 U.S.C.A. §1419 (1990).

[120] 20 U.S.C.A. §§1471-1485 (1990).

[121] 20 U.S.C.A. §1476 (1990).

[122] 20 U.S.C.A. §1471(a) (1990).

Handicapped infants and toddlers within the meaning of the EAHCA are those children from birth through age two who require early intervention services because they are experiencing developmental delays or have a diagnosed physical or mental condition that has a high probability of resulting in developmental delay.[123] Depending on state law, handicapped infants and toddlers may also include children from birth through two who are at risk of having substantial developmental delays if early intervention services are not provided.

Early intervention services under the EAHCA are developmental services provided under public supervision that are designed to meet the child's needs in physical development, cognitive development, language and speech development, psychosocial development and/or the development of self-help skills.[124] These services may include the following:

> (i) family training, counseling and home visits.
> (ii) special instruction.
> (iii) speech pathology and audiology.
> (iv) occupational therapy.
> (v) physical therapy.
> (vi) psychological services.
> (vii) case management services.
> (viii) medical services only for diagnostic or evaluation purposes.
> (ix) early identification, screening, and assessment services.
> (x) health services necessary to enable the infant or toddler to benefit from the other early intervention services. . . .[125]

The law permits the federal or state government to provide for a system of payments by families for such services, including a schedule of sliding fees.[126] Any such state system requiring payment by families is subject to some limitations, however. The regulations enacted pursuant to Part H prohibit the charging of fees for certain specified services, including those pertaining to evaluations, assessments and case management.[127] Furthermore, although states may establish reasonable standards regarding the ability and inability of parents to pay, such standards may "not result in denial of services to an eligible child or the child's family because of inability to pay."[128]

One of these services—case management—must be made available to handicapped infants and toddlers and their families, although it is not required for school-age children. "Case management" means activities conducted by a case manager to assist a Part H child and the child's family to receive the rights, procedural safeguards and services available under the state's early intervention program. Under Part H, each eligible child and his or her family must be provided with a case manager, who is responsible for (i) coordinating all services across agency lines; and (ii) serving as the single point of contact in helping parents to obtain the services and assistance they need.[129]

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[123] 20 U.S.C.A. §1472(1) (1990).

[124] 20 U.S.C.A. §1472(2)(C) (1990).

[125] 20 U.S.C.A. §1472(2)(E) (1990).

[126] 20 U.S.C.A. §1472(2)(B) (1990).

[127] 34 C.F.R. §303.521(b) (1990).

[128] OSEP Policy Memorandum 90-14, 16 EHLR at 709 (1990).

Case management is an active ongoing process that continuously seeks appropriate services in situations that will benefit the child's development.[130] Case management activities, which are all carried out in conjunction with the family, include:

> (1) Coordinating the performance of evaluations and assessments;
>
> (2) Facilitating and participating in the development, review, and evaluation of individualized family service plans;
>
> (3) Assisting families in identifying available service providers;
>
> (4) Coordinating and monitoring the delivery of available services;
>
> (5) Informing families of the availability of advocacy services;
>
> (6) Coordinating with medical and health providers; and
>
> (7) Facilitating the development of a transition plan to pre-school services, if appropriate.[131]

State law is to determine how case managers may be employed or assigned.[132] Case managers are required to have demonstrated knowledge and understanding, however, about "(1) Infants and toddlers who are eligible under this part; (2) Part H of the Act and the regulations in this part; and (3) The nature and scope of services available under the State's early intervention program. . . ."[133]

Instead of describing programming services to be provided to the child in an IEP (as required for children ages 3 to 21 under the EAHCA), the Handicapped Infants and Toddlers Act requires development of an individualized family service plan (IFSP).[134] This plan must include the following:

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[129] 34 C.F.R. §303.6(a)(2) (1990).

[130] 34 C.F.R. §303.6(a)(3) (1990).

[131] 34 C.F.R. §303.6(b) (1990).

[132] 34 C.F.R. §303.6(c) (1990).

[133] 34 C.F.R. §303.6(d) (1990).

[134] The public agency must complete evaluation and assessment activities and hold an IFSP meeting within 45 days of receiving a referral of a child. 34 C.F.R. §303.321(e) (1990).

- A statement of the infant or toddler's present levels of development;
- A statement of the family's strengths and needs;
- A statement of the major outcomes expected to be achieved for the child and family (as well as criteria, procedures and timelines used to determine progress);
- A statement of specific early intervention services needed to meet the unique needs of the child and family;
- Projected dates for initiation, and the anticipated duration, of services;
- The name of the case manager;
- The steps to be taken to support transition to services available to 3 year olds and above.[135]

The Act's focus with respect to handicapped infants and toddlers is on the family. For this reason the document that is developed is called an individualized *family* service plan. Since children of this age typically have short attention spans and are unable to participate in lengthy intervention sessions, it is critical for the professionals involved to be able to extend their own impact by working through the family. This makes practical sense, for it allows the services to be continued somewhat beyond those limited times the professional is in direct contact with the handicapped child.

Part H also requires each state system to establish and maintain a central directory of information.[136] This directory must contain information concerning public and private early intervention services, resources, and experts available in the state. It must also provide information about professional and other groups (including parent support groups and advocate associations) that provide assistance to eligible children and their families.

Furthermore, each state's early intervention system must include a comprehensive child-find system.[137] In addition to meeting the child-find requirements applicable to Part B of the Act,[138] the child-find system must ensure that:

> (1) All infants and toddlers in the State who are eligible for services under this part are identified, located, and evaluated; and
>
> (2) An effective method is developed and implemented to determine which children are receiving needed early intervention services, and which children are not receiving those services.[139]

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[135] Adapted from 20 U.S.C.A. §1477(d) (1990).

[136] 34 C.F.R. §303.301 (1990).

[137] 34 C.F.R. §303.321 (1990).

[138] 34 C.F.R. §300.128 (1988).

[139] 34 C.F.R. §303.321(b) (1990).

This part also provides for procedural safeguards.[140] Initially, parental consent is required before the public agency may conduct an initial evaluation and assessment of a child or initiate the provision of early intervention services for the first time.[141] This consent must be in writing and must be based upon the parent being fully informed of all information relevant to the activity for which consent is sought.[142] This parental consent is voluntary, and it may be revoked at any time.[143] As with school-age children, however, the public agency can initiate a due process hearing or other procedure to override a parent's refusal to consent to the initial evaluation of a child.[144]

Part H further provides that there must be a timely administrative resolution of parental complaints before a public agency or service provider initiates or changes, or refuses to initiate or change, either the identification, evaluation, or placement of their child or the provision of appropriate early intervention services to their child and their child's family.

Each state has two options concerning the administrative resolution procedure it wishes to establish. The first simply involves adopting the due process procedures applicable to school-age handicapped students.[145] The second is to establish procedures that meet the requirements set forth in the regulations promulgated pursuant to Part H:[146] appointment of an impartial decisionmaker,[147] application of basic due process rights in administrative proceedings,[148] convention of the proceeding at a time and place that is reasonably convenient to the parents,[149] and the right to bring a civil action in state or federal court upon conclusion of the administrative process.[150]

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[140] 20 U.S.C.A. §1480 (1990).

[141] 34 C.F.R. §303.404 (1990).

[142] 34 C.F.R. §303.401 (1990).

[143] 34 C.F.R. §303.401(a)(3) (1990).

[144] 34 C.F.R. §303.404, note 2 (1990).

[145] *See* 34 C.F.R. §300.506-512 (1988).

[146] 34 C.F.R. §303.421-425 (1990).

[147] 34 C.F.R. §303.421 (1990).

[148] 34 C.F.R. §303.422 (1990) provides for the right to:

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to early intervention services for children eligible under this Part;
(2) Present evidence, and confront, cross-examine and compel the attendance of witnesses;
(3) Prohibit the introduction of any evidence at the proceding that has not been disclosed to the parent at least five days before the proceeding;
(4) Obtain a written or electronic verbatim transcription of the proceeding; and
(5) Obtain written findings of fact and decisions.

These protections are similar to those available to school-age children, with at least two apparent, significant differences. First, the written decision by the impartial decisionmaker under the Part H regulations must be provided no later than 30 days after the receipt of a parent's complaint.[151] The school-age due process procedures permit 45 days.[152] Second, while the school-age procedures permit states to establish a two-tier administrative system (a hearing plus appeal), the Part H regulations provide for only one administrative proceeding.

Strictly similar protections in the two Acts include the stay-put and confidentiality provisions. The stay-put principle applicable under Part H is basically unchanged from Part B.[153] A child who has not yet received any services must receive those services that are not in dispute while a complaint is being pursued. Furthermore, as with school-age youngsters, confidentiality of information is protected.[154]

IX. Pending Legislation

As this text went to print, legislation was pending in both houses of the United States Congress concerning reauthorization of the EAHCA that, if enacted, would result in modifications to the Act. The Senate bill is entitled the "Education of Individuals with Disabilities Act of 1989" (EIDA);[155] the House bill is entitled "Individuals with Disabilities Education Act of 1990" (IDEA).[156] Both bills would change the word "handicapped" as used in the Act to the word "disabled" and would eliminate such language in the EAHCA as the phrase "handicapped child" in favor of such so-called "people first" language as the phrase "child with disabilities."[157]

Several substantive changes would also be effected by passage of provisions in the bills. For example, under both bills children suffering from autism and head injuries would be separately classified as disabled.[158] The House bill would also add "attention deficit disorder" (ADD) as a specifically included disability under the definition of "health impaired" children covered by the Act.[159] In addition, both bills would add social work services as a listed related service to be provided under the Act, [160] and the House bill would also list rehabilitation counseling as a specified related service.[161] Both bills proposed adding both assistive technology services[162] and assistive technology devices[163] as specified related services to be provided under the Act.

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[149] 34 C.F.R. §303.423 (1990).

[150] 34 C.F.R. §303.424 (1990).

[151] 34 C.F.R. §303.423(b) (1990).

[152] 34 C.F.R. §300.512 (1988).

[153] 34 C.F.R. §303.425 (1990). *See also*, the discussion of the stay-put provision earlier in this chapter.

[154] 34 C.F.R. §303.460 (1990).

[155] S. 1824, 101st Cong., 1st Sess., §1 (1989).

[156] H.R. 1013, 101st Cong., 2d Sess., §901 (1990).

[157] S. 1824, 101st Cong, 1st Sess., §§1-30 (1989) and H.R. 1013, 101st Cong., 2d Sess., §901 (1990).

Moreover, the House bill would add the following definition of transition services—which is to be provided for all children with disabilites no later than age 16:

> . . . a coordinated set of activities for a student, designed with an outcome-oriented process, which promotes movement from school to integrated employment (including supported employment), post-secondary education, vocational training, continuing and adult education, adult services, independent living, or community participation. The coordinated set of activities shall be based upon the individual student's needs, taking into account the student's preferences and interests, and shall include, but not be limited to, instruction, community experiences, the development of employment and other post-school adult living objectives, and when appropriate acquisition of daily living skills and functional vocational education.[164]

A statement describing the needed transition services, including any appropriate "interagency responsibilities or linkages," would be required to be placed in the IEP for all eligible children.[165] Furthermore, the House bill would recognize social work services as a specifically listed service available to disabled infants and toddlers.[166] Both bills would also remove the sovereign immunity protection that has applied to states.[167]

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[158] S. 1824, 101st Cong., 1st Sess., §2 (1989) (autism and head injuries) and H.R. 1013, 101st Cong., 2d Sess., §101(a) (1990) (autism and traumatic brain injury).

[159] H.R. 1013, 101st Cong., 2d Sess., §101(a) (1990). The Senate bill does not include ADD as a specified disability because the Senate Committee on Labor and Human Resources "fully intends that the term 'minimal brain dysfunction,' as included under the definition of 'specific learning disability' in 34 C.F.R. 300.5, is to be interpreted to include the condition of attention deficit disorder." Committee on Labor and Human Resources, S. Rep. No. 101-204, 101st Cong., 1st Sess., §9 (1989).

[160] S. 1824, 101st Cong., 1st Sess., §2 (1989); H.R. 1013, 101st Cong., 2d Sess., §101(c) (1990).

[161] H.R. 1013, 101st Cong., 2d Sess., §101(c) (1990). The Senate Committee on Labor and Human Resources explained why it did not propose adding rehabilitation counseling as a specified related service: "it is the strong intent of the Committee that counseling services be construed to include rehabilitation counseling services. . . ." Senate Committee Report, S. Rep. No. 101-204, 101st Cong., 1st Sess., §9 (1989).

[162] S. 1824, 101st Cong., 1st Sess., §2 (1989); H. R. 1013, 101st Cong., 2d Sess., §101(g) (1990).

[163] S. 1824, 101st Cong., 1st Sess., §2 (1989); H.R. 1013, 101st Cong., 2d Sess., §101(f) (1990).

[164] H.R. 1013, 101st Cong., 2d Sess., §101(d) (1990).

[165] H.R. 1013, 101st Cong., 2d Sess., §101(e) (1990).

The ramifications of the above amendments, if enacted, remain to be seen. It is anticipated that several of the amendments would result in more appropriate planning and services for children with disabilities.

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[166] H.R. 1013, 101st Cong., 2d Sess., §801 (1990).

[167] S. 1824, 101st Cong., 1st Sess., §3 (1989); H.R. 1013, 101st Cong., 2d Sess., §102 (1990). *See* chapter 17 of this text, *infra*, for a discussion of sovereign immunity and the potential impact of pending legislation.

Both the Senate and House bills have several additional provisions, including those related to funding, research projects and demonstration programs.

14

Education for All Handicapped Children Act: Procedural Issues

I. Introduction

This chapter analyzes some of the procedural issues that arise in actions and proceedings pursued under the EAHCA. Some of these issues involve legal questions that are not unique to actions under the Act. For example, this chapter addresses the manner in which the doctrine of exhaustion of administrative remedies is applied to the EAHCA. Similarly, it discusses statutes of limitations in the context of EAHCA actions. Since the time limit in which a plaintiff may file an action under the EAHCA varies among states, the chapter includes a listing of those cases that have addressed this issue as it applies to the Act.

A third issue that has general application beyond the EAHCA is judicial review, an issue that concerns the scope and degree of review a court may or will exercise in matters before it. Insofar as EAHCA actions are concerned, resolution of this question involves determining how much, if any, deference should be given to educational officials and to the prior decisions of hearing officers. The following section of this chapter discusses the related issue of burden of proof. In analyzing which party bears the burden of proving its position, the text addresses the extent of that burden in the contexts of administrative hearings and judicial proceedings.

The remaining sections of this chapter are concerned with procedural issues unique to the EAHCA. The stay-put (status quo) provision, for example, is a creation of the Act.[1] It requires a handicapped child to remain in his or her "then current educational placement"[2] during pendency of administrative and judicial proceedings concerning such placement. The nuances of this provision and difficulties in its implementation are the focus of one section of this chapter.

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[1] 20 U.S.C.A. §1415(e)(3) (1990).

[2] *Id.*

Discipline as it relates to handicapped children is closely related to the stay-put provision. Thus, this chapter describes and analyzes the procedures that must be followed when taking certain disciplinary actions against disabled children so as not to cause an impermissible change of placement in violation of the stay-put provision. This chapter also addresses the application of disciplinary procedures to children protected by Section 504[3] (which applies to disabled students who are not educationally handicapped) but who do not fall within the parameters of the EAHCA.

The last section of this chapter concerns the impartiality of hearing officers. This section focuses on the regulatory and judicial directives describing those circumstances in which hearing officers have or have not been determined to be impartial.

II. Exhaustion of Administrative Remedies

The EAHCA requires that a litigant pursue the statutorily prescribed administrative remedies to conclusion before seeking relief from the court.[4] This doctrine of exhaustion of administrative remedies serves several salutary purposes. First, administrative personnel are often viewed as more expert than judges as decision-makers in their particular specialty area. Consequently, it is argued, requiring administrative review should ultimately lead to better dispute resolution.[5] Second, exhaustion of administrative remedies may reduce overall litigation costs and lead to judicial economy by absorbing less of the courts' time. Finally, exhaustion supports deference to agency autonomy.

Prior to filing suit under the EAHCA, therefore, parents of a handicapped child must first follow due process procedures. If parents are unhappy with the IEP proposed for their child, they can request a due process hearing.[6] Once the hearing officer has rendered a decision, the losing party may seek an appeal of that decision. In those states that provide the initial hearing at the local level, a state-level administrative review is available and required as the next step. In those states in which the initial hearing is provided at the state level, the court is the next step. In either event, the party disappointed at the state level is permitted to seek recourse from the courts. As a general rule the courthouse doors are not open to an aggrieved party unless and until that party has first sought relief through the administrative process.[7]

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[3] 29 U.S.C.A. §794 (West Supp. 1990).

[4] *See, e.g.*, 20 U.S.C.A. §1415 (1990).

[5] *See, e.g.*, *Buffolino v. Board of Education of Sachem Central School District*, 729 F. Supp. 240 (E.D.N.Y. 1990), 16 EHLR 496 (plaintiffs in damage action pursuant to the EAHCA were required to exhaust in order to benefit from focus and illumination of the issues resulting from administrative review).

[6] 34 C.F.R. §300.506 (1988). A school district can also take a parent to a hearing to obtain the necessary consent to initially evaluate a child who is suspected of being handicapped or to obtain authority to initially provide special education and related services. 34 C.F.R. §300.504(c) (1988).

Prior to enactment of the Handicapped Children's Protection Act (HCPA) in 1986,[8] parties attempted to circumvent the exhaustion requirement by alleging a violation of Section 504 of the Rehabilitation Act[9] or of Section 1983 of the Civil Rights Act.[10] Exhaustion of administrative remedies is not required under either of those statutes. The HCPA clarified the procedural requirements under the EAHCA by explicitly requiring parties to pursue administrative remedies through the EAHCA before seeking recourse via Section 504 or other statutes.[11]

There are some general principles of law providing exceptions to this requirement. These exceptions, which are applicable in the context of the EAHCA, are in essence a matter of common sense. First, a party is not required to exhaust administrative remedies where the administrative remedy is inadequate.[12] Thus a plaintiff in a federal action under the EAHCA need not exhaust administrative remedies when it would be futile to do so.[13] Futility cannot be established,

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[7] *See, e.g., Doe v. Smith*, 879 F.2d 1340 (6th Cir. 1989), 15 EHLR 441:544, *cert. denied*, _____ U.S. _____, 110 S. Ct. 730 (1990); *McGovern v. Sullins*, 676 F.2d 98 (4th Cir. 1982), 1981-82 EHLR 553:648; *Timms v. Metropolitan School District*, 722 F.2d 1310 (7th Cir. 1983), 1983-84 EHLR 555:177; *Dima v. Macchiarola*, 513 F. Supp. 565 (E.D.N.Y. 1981), 1980-81 EHLR 552:438; *Harris v. Campbell*, 472 F. Supp. 51 (E.D. Va. 1979), 1979-80 EHLR 551:248; *Drohan v. Drohan*, 1984-85 EHLR 556:207 (N.D.N.Y. 1984).

[8] Pub. L. No. 99-372, amending 20 U.S.C. §§1415(e)(4) and (f).

[9] 29 U.S.C.A. §794 (West Supp. 1990). For a more detailed discussion of Section 504, *see* chapters 3-8 of this text, *supra*.

[10] 42 U.S.C.A. §1983 (1981) (prohibiting violation of constitutional or federal statutory rights by a person acting under the authority or apparent authority of state law).

[11] 20 U.S.C.A. §1415(f) (1990).

[12] *See, e.g., Gibson v. Berryhill*, 411 U.S. 564, 93 S. Ct. 1689 (1973) (exhaustion not required where the administrative board that would determine the issue of whether licensed optometrists had committed unprofessional conduct was biased and had a pecuniary interest in the outcome); *McNeese v. Board of Education*, 373 U.S. 668, 83 S. Ct. 1433 (1963) (exhaustion not required where the state decisionmaking authority could make "recommendations" but could make no controlling finding of law or fact); *Union Pacific Railroad Co. v. Board of County Commissioners*, 247 U.S. 282, 38 S. Ct. 510 (1918) (exhaustion not required where ambiguity of the state statute made the administrative remedy, if any, debatable and uncertain); *Hollenbeck v. Board of Education of Rochelle Township*, 699 F. Supp. 658 (N.D. Ill. 1988), 15 EHLR 441:281 (in action claiming LEA's failure to comply with hearing officer's order, exhaustion not required where no administrative mechanism was available to enforce hearing officer's decision); *Tracy T. v. McDaniel*, 1984-85 EHLR 556:331 (N.D. Ga. 1984) (exhaustion not required where, due to state policy, hearing officer not authorized to approve funding in excess of 180 days; thus it would have been futile to raise the issue at the administrative level); *Hark v. School District*, 505 F. Supp. 727 (E.D. Pa. 1980), 1980-81 EHLR 552:360 (exhaustion not required where no administrative remedy was available to parents who sought reimbursement for amounts expended to place their child in what was eventually determined to be an appropriate school); *Sherry v. New York*

State Education Department, 479 F. Supp. 1328 (W.D.N.Y. 1979), 1979-80 EHLR 551:519 (injunctive and declaratory relief sought regarding suspension of handicapped child from State School for the Blind; exhaustion not required where administrative remedy was a procedure that could lead to a cutoff of funding to the particular agency but did not afford individuals an immediate, effective means to vindicate their own rights; also no provision existed requiring the agency to allow child to remain in place pending resolution of the complaint).

There is some difference of opinion as to whether hearing officers have the authority to award tuition reimbursement pursuant to *School Committee of the Town of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S. Ct. 1996 (1985), 1984-85 EHLR 556:389 (holding that parents who prevail on their claim that a school district failed to provide a FAPE for their handicapped child may be reimbursed by the school district for tuition expended on appropriate schooling). (*See* chapter 17 of this text, *infra*, for a discussion of the reimbursement issue.) *See S-1 v. Spangler*, 650 F. Supp 1427, 1431 n.4 (M.D.N.C. 1986), 1986-87 EHLR 558:179, *vac. and remanded*, 832 F.2d. 294 (4th Cir. 1987), 1987-88 EHLR 559:266 (citing decisions in which state procedures allowed claims for tuition reimbursement to be decided in the administrative process); *Frankel v. Commissioner of Education*, 480 F. Supp. 1156 (S.D.N.Y. 1979), 1979-80 EHLR 551:375 (plaintiffs enrolled their son at private residential out-of-state school at their own expense; hearing officer recommended the school district reimburse the parents for the cost of tuition; the multidisciplinary team then recommended to the board the denial of reimbursement of tuition; board accepted the recommendation to deny reimbursement; commissioner dismissed plaintiffs' appeal; district court held, *inter alia*: plaintiffs were not required to obtain approval of the commissioner to place their son in a private, out-of-state institution); *Palo Alto Unified School District*, 1985-86 EHLR 507:205 (Cal. SEA 1985) (hearing officer held that school district should reimburse parent for non-public school costs); *Baltimore Maryland City School*, 1986-87 EHLR 508:117 (Md. SEA 1986) (hearing review board does not have authority to order district to reimburse parents for expenses incurred while child was suspended because it has no specific authority to award damages; the administrative remedies under the EAHCA were exhausted regarding this issue); *In re Charles B.*, 1985-86 EHLR 507:517 (Md. SEA 1986) (hearing review board refused to award damages or compensatory educational services because not authorized to do so); *Michael I.*, 1985-86 EHLR 507:222 (Mass. SEA 1985) (hearing officer denied parents' request for reimbursement after parents had requested financial compensation for violations resulting in the denial of educational services to their son); *Case No. 137*, 1985-86 EHLR 507:367 (Vt. SEA 1986) (state reviewing officer held that under current state law she could not grant parent's request for retroactive reimbursement). *See also* OSERS Policy Letter, EHLR 211:429A (1987) (hearing officers have the authority to determine whether parents are entitled to be reimbursed for their child's unilateral placement). Exhaustion is presumably excused when the hearing officer does not have authority to award such relief.

[13] *See, e.g., Honig v. Doe*, 484 U.S. 305, 108 S. Ct. 592 (1988), 1987-88 EHLR 559:231 (parents may bypass the administrative process where exhaustion would be futile or inadequate); *Vander Malle v. Ambach*, 673 F.2d 49 (2d Cir. 1982), 1981-82 EHLR 553:589 (plaintiffs sought a preliminary injunction to enforce state's interim obligation to maintain 20-year-old emotionally disturbed child in a psychiatric hospital until alternative placement could be made; no exhaustion required where the commissioner already had considered the precise facts and rejected plaintiffs' claim and where the practical effect of exhaustion would be to deny the precise interim relief being sought); *Diamond v. McKenzie*, 602 F. Supp. 632 (D.D.C. 1985), 1984-85 EHLR 556:326 (exhaustion not required where inappropriate conduct of the school district even after a decision by the hearing officer indicated that further administrative proceedings would be futile); *Stock v. Massachusetts Hospital School*, 1983-84 EHLR 555:550 (Sup. Ct. Mass. 1984) (where question presented was of law—*i.e.*, whether graduation constitutes a "change in placement" under the EAHCA—failure to exhaust was excusable because the invocation of administrative procedures was virtually impossible); *Armstrong v. Kline*, 476 F. Supp.

however, by claiming that the administrative process is time consuming[14] nor by a showing that the LEA has repeatedly failed to devise an appropriate IEP.[15]

Second, exhaustion is not required when the practical effect of requiring exhaustion would be to deny the ultimate relief being sought. This result would usually occur due to the delay that would inevitably be caused by pursuing the administrative process.[16] Third, administrative remedies need not be pursued when the issue in dispute is a pure matter of law.[17] This exception is premised on the recognition that the expertise of administrative officials is of little value when the sole issue to be decided is a question of law, which the courts are particularly suited to resolve. Additional exceptions include those in which the legality of the administrative process itself is being challenged,[18] where the adequacy of the

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583 (E.D. Pa. 1979), 1979-80 EHLR 551:185, *remanded on other grounds*, *Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), 1979-80 EHLR 551:647, *cert. denied*, *Scanlon v. Battle*, 452 U.S. 968 (1981) (exhaustion not required where Pennsylvania due process procedures would have been of no avail to plaintiffs challenging state policy that denies FAPE in excess of 180 days; hearing officers in fact had been instructed that they could not order a special education program in excess of 180 days per year); *Loughran v. Flanders*, 470 F. Supp. 110 (D.C. Conn. 1979), 1979-80 EHLR 551:161 (exhaustion would be futile where the state procedure had no relevance to the question of whether there is a private remedy for damages regarding the alleged failure to diagnose and remedy a child's learning disability).

[14] *See, e.g.*, *Howell v. Waterford Public Schools*, 731 F. Supp. 1314 (E.D. Mich. 1990), 16 EHLR 594 (exhaustion is not futile simply because it may be time consuming).

[15] *See, e.g.*, *Cox v. Jenkins*, 878 F.2d 414 (D.C. Cir. 1989), 15 EHLR 441:492 (futility does not arise as a result of an LEA's repeated failures to devise an appropriate IEP).

[16] *See, e.g.*, *Jose P. v. Ambach*, 669 F.2d 865 (2d Cir. 1982), 1981-82 EHLR 553:486 (exhaustion not required where the individual appeal mechanism would be inappropriate to resolve the systemic compliance issues raised in this class action); *Sherry v. New York State Education Department*, 479 F. Supp. 1328 (W.D.N.Y. 1979), 1979-80 EHLR 551:519 (exhaustion not required where the handicapped child's claim was based upon a public agency's failure to provide an administrative hearing); *DeVries v. Spillane*, 853 F.2d 264 (4th Cir. 1988), 15 EHLR 441:175 (parent who continued to seek placement of handicapped child in neighborhood school was not required to reexhaust administrative remedies when a second IEP was proposed while case challenging first IEP was pending). *But see*, *Anderson v. Smith*, 15 EHLR 441:596 (M.D. Tenn. 1989) (parents required to exhaust even though hearing was not timely scheduled because they contributed to the delay).

[17] *See, e.g.*, *Fuentes v. Roher*, 519 F.2d 379 (2d Cir. 1975) (exhaustion not required where the legal issue in dispute was the alleged inadequacy of the state administrative remedy).

[18] *See, e.g.*, *Christopher N. v. McDaniel*, 569 F. Supp. 291 (N.D. Ga. 1983), 1983-84 EHLR 555:209 (hearing officers have no authority to consider the legality of state regulations); *Davis v. District of Columbia Board of Education*, 522 F. Supp. 1102 (D.D.C. 1981), 1981-82 EHLR 553:237, *on reh'g*, 530 F. Supp. 1215 (D.D.C. 1982), 1981-82 EHLR 653:494 (plaintiff's interruption of due process hearing to seek judicial relief was proper; completing an improperly administered hearing would have been a futile gesture); *Monahan v. Nebraska*, 491 F. Supp. 1074 (D. Neb. 1980), 1980-81 EHLR 552:207, *aff'd in part, vac. in part*, 645 F.2d 592 (8th Cir. 1981), 1981-82 EHLR 552:380 (exhaustion not required where claim that Nebraska statutes create an administrative procedure that violates mandates of federal law would render exhaustion a futile gesture).

administrative remedy is, for all practical purposes, co-extensive with the merits of the claim itself,[19] or where no meaningful administrative process is available.[20]

Other circumstances in which immediate access to the courts has been allowed include instances in which a policy of general applicability is being challenged,[21] a class-action lawsuit is being pursued,[22] systemic violations are alleged,[23] procedural irregularities or deficiencies have affected a parent's ability to pursue administrative remedies,[24] or it is clear that improper injury is occurring or is about to occur.[25]

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[19] *See, e.g., Fuentes v. Roher*, 519 F.2d 379 (2d Cir. 1975) (suspended school superintendent was not required to exhaust administrative remedies where the adequacy of the administrative procedure was coextensive with the merits of the court action claiming violations of due process).

[20] *Gary B. v. Cronin*, 542 F. Supp. 102 (N.D. Ill. 1980) (plaintiffs challenging state rule excluding counseling and therapeutic services from being considered as special education or related services were not required to exhaust due to absence of a meaningful administrative process).

[21] *See, e.g., Parks v. Pavkovic*, 536 F. Supp. 296 (N.D. Ill. 1982), 1980-81 EHLR 553:610, *aff'd in part, rev'd in part on other grounds*, 753 F.2d 1397 (7th Cir. 1985), 1984-85 EHLR 556:372 (exhaustion not required with respect to a challenge to statewide policies regarding payment of the educational expenses of handicapped children in Illinois); *Doe v. Koger*, 480 F. Supp. 225 (N.D. Ind. 1979), 1979-80 EHLR 551:515 (exhaustion not required where local and state administrative remedies did not provide for a challenge to the procedure by which child was expelled from school).

[22] *See, e.g., Hendricks v. Gilhool*, 709 F. Supp. 1364 (E.D. Pa. 1989), 15 EHLR 441:352 (exhaustion not required in a class action challenging manner of systemwide provision of classroom space to children referred to Intermediate Education Unit); *Medley v. Ginsberg*, 492 F. Supp. 1294 (S.D. W. Va. 1980) (exhaustion not required in a class action on behalf of mentally retarded children and young adults to redress rights deprived by institutionalization of plaintiffs by the state); *Armstrong v. Kline*, 476 F. Supp. 583, 602 n. 6 (E.D. Pa. 1979), 1979-80 EHLR 551:195, *remanded on other grounds*, *Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), 1979-80 EHLR 551:647, *cert. denied*, *Scanlon v. Battle*, 452 U.S. 968 (1981) (named plaintiffs and members of the class were not required to exhaust where to do so would have been futile).

[23] *See, e.g., J.G. v. Board of Education of Rochester City School District*, 830 F.2d 444 (2d Cir. 1987), 1987-88 EHLR 559:136 (exhaustion not required in a class action asserting systemic claims, including deprivation of due process rights to proper notice and hearing); *Gebhardt v. Ambach*, 1982-83 EHLR 554:341 (W.D.N.Y. 1983) (exhaustion not required in a class action challenging the entire program, procedures and institutionwide practices of the New York State School for the Blind); *Dore T. v. Board of Education of the Northeastern Clinton Central School District*, 1982-83 EHLR 554:246 (N.D.N.Y. 1982) (exhaustion not required where plaintiffs challenged the validity of SEA regulations and due process violations); *J.G. v. Board of Education of Rochester City School District*, 1982-83 EHLR 554:265 (W.D.N.Y. 1982) (exhaustion not required in a class action alleging systemwide violations of EAHCA procedures in connection with school district's evaluation, classification and placement of handicapped students).

[24] *See, e.g., Abney ex rel. Kantor v. District of Columbia*, 849 F.2d 1491 (D.C. Cir. 1988), 1987-88 EHLR 559:501 (surrogate parent was not required to exhaust for period during which LEA failed to notify her that child was not receiving a FAPE); *Doe v. Maher*, 793 F.2d 1470 (9th Cir. 1986), 1985-86 EHLR 557:353, *aff'd*, *Honig v. Doe*, 484 U.S. 305, 108 S. Ct. 592 (1988), 1987-88 EHLR 559:231 (failure to perform statutory duty to inform handicapped children, suspended due to misconduct, regarding safeguards and review); *Manecke v. School Board of Pinellas County*, 762 F.2d 912 (11th Cir. 1985), 1984-85 EHLR 556:463 (local educational agency denied child access to impartial due process hearing); *Jose P. v. Ambach*, 669 F.2d 865 (2d Cir. 1982), 1981-82 EHLR 553:486 (class action alleging failure to evaluate in timely manner and place in appropriate programs); *Andre H. v. Ambach*, 104

Although the general rules requiring exhaustion and its recognized exceptions are clear and understandable in the abstract, proper application of these principles has presented some difficulty. For instance, in *Riley v. Ambach*[26] plaintiffs challenged a New York State Education Department standard requiring a 50 percent discrepancy between a child's achievement and ability levels to render a child eligible to be classified as learning disabled. The plaintiffs complained that a 50 percent discrepancy was not required under the EAHCA definition for learning disabilities, and that the 50 percent discrepancy requirement conflicted with the criteria for determining a specific learning disability set forth in the applicable EAHCA regulation, which requires a "severe discrepancy" between achievement and intellectual ability.[27]

The plaintiffs in *Riley* also challenged the Commissioner of Education's policy determination that no learning disabled child could be assigned to a residential placement because learning disabled children can be serviced in a less restrictive environment. The plaintiffs claimed that this approach conflicted with

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F.R.D. 606 (S.D.N.Y. 1985) (in class action alleging that state and local officials failed to implement policies and procedures to ensure IEPs, the question of the adequacy of the procedure is the same question raised by the merits); *Kerr Center Parents Association v. Charles*, 572 F. Supp. 448, 1983-84 EHLR 555:168, *supplemented*, 581 F. Supp. 166 (D. Or. 1983), 1983-84 EHLR 555:319 (no due process hearings were allowed when parents and handicapped children challenged school district's discontinuance of educational programs); *Christopher T. v. San Francisco Unified School District*, 553 F. Supp. 1107 (N.D. Cal. 1982), 1982-83 EHLR 554:351 (where the LEA refused to extend advice or assistance to families of children who might be eligible for funding under the EAHCA, exhaustion would be futile and the administrative remedy does not provide an adequate means for redressing the grievance); *Garrity v. Gallen*, 522 F. Supp. 171 (D.N.H. 1981), 1981-82 EHLR 553:151, *aff'd in part, vac. in part, and remanded sub nom., Garrity v. Sununu*, 752 F.2d 727 (1st Cir. 1984), 1984-85 EHLR 556:306 (residents of school for mentally retarded children did not have to exhaust administrative remedies prior to filing class action based on Section 504); *Sherry v. New York State Education Department*, 479 F. Supp. 1328 (W.D.N.Y. 1979), 1979-80 EHLR 551:519 (exhaustion not required where student was effectively given long-term suspension without a hearing). *But see, Anderson v. Smith*, 15 EHLR 441:596 (M.D. Tenn. 1989) (parents' failure to request a new hearing or review by another hearing officer due to lack of timely decision by hearing officer—rights for which parents had received notice—was considered to be a failure to exhaust administrative remedies).

[25] *See, e.g., Parks v. Pavkovic*, 536 F. Supp. 296 (N.D. Ill. 1982), 1981-82 EHLR 553:610, *aff'd in part, rev'd in part on other grounds*, 753 F.2d 1397 (7th Cir. 1985), 1984-85 EHLR 556:372 (on motion for preliminary injunction, exhaustion not required where administrative decision could not be obtained before the child would be discharged from the residential treatment facility in which he had been placed); *Cox v. Brown*, 498 F. Supp. 823 (D.D.C. 1980), 1980-81 EHLR 552:220 (in action for preliminary injunction to place children in private schools where they could receive special education services, the extent of irreparable harm was sufficient to reject the exhaustion requirement); *North v. District of Columbia Board of Education*, 471 F. Supp. 136 (D.D.C. 1979), 1979-80 EHLR 551:157 (preliminary injunction granted requiring residential education services where multiply handicapped child was about to suffer irreparable injury; exhaustion not required).

[26] 668 F.2d 635 (2d Cir. 1981), 1980-81 EHLR 552:410.

[27] 34 C.F.R. §300.541(a)(2) (1988). Note that the references to the EAHCA regulations in *Riley v. Ambach* are to 45 C.F.R.; those regulations have since been transferred to 34 C.F.R. Part 300 (1988).

the EAHCA principle of making placement decisions on an individual basis and exhibited a failure to make available a continuum of educational placements.[28] The plaintiffs alleged that the positions taken by the SEA were clearly contrary to the EAHCA and its implementing regulations and that, consequently, exhaustion of administrative remedies was not required. Plaintiffs apparently claimed that only issues of law were involved. Furthermore, they argued that pursuit of the administrative procedures would be futile because the Commissioner of Education was himself the hearing officer at the state level of review in the administrative process.

Despite the apparent merit of the plaintiffs' claim that they fell within an exception to the rule requiring exhaustion of administrative remedies, the court concluded that exhaustion was required. Concerning the 50 percent discrepancy rule, the court noted that it preferred to be presented with, and to consider, a concrete case rather than to attempt to address the abstract issue being presented. The court seemed to be uncomfortable with the plaintiffs' contention that the "50% discrepancy" standard was necessarily more restrictive than the "severe discrepancy" required by the federal definition. The court stated that it wanted to be presented with, and have the opportunity to review, an actual set of facts to ensure that it reached the proper conclusion.

The *Riley* court's determination concerning the residential placement issue is somewhat more incomprehensible. The Second Circuit stated:

> The Commissioner has . . . made a blanket decision that residential placements are not necessary for learning disabled children unless they suffer from an additional problem, such as emotional disturbance. . . . Yet exhaustion . . . might not prove futile, as the Commissioner might reverse himself in a compelling case, if he were proved wrong and a residential placement was shown to be clearly necessary for a learning disabled child.[29]

This language is particularly difficult to reconcile with the exceptions to exhaustion (which are recognized in the *Riley* decision), since the *Riley* analysis leaves little if any breathing room for application of these exceptions.[30] Futility has generally been interpreted to encompass an appearance before the governmental official who established the rule being challenged.[31]

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[28] 34 C.F.R. §300.551 (1988).

[29] 668 F.2d at 642, 1980-81 EHLR at 552:414.

[30] One possible means of reconciling the *Riley* holding with the continued viability of the exhaustion exceptions would be to view the *Riley* decision as resting on some notion of "standing." The doctrine of "standing" requires that the plaintiff be either an injured party or one who is in danger of becoming injured due to the actions of the defendant.

The *Riley* court seems concerned with standing when it makes reference to the need for a concrete set of facts before the court. Those references apparently relate to the court's ability to conclude whether the "50% discrepancy" standard is more restrictive than the "severe discrepancy" standard and whether there are, in fact, learning disabled children (for whom that is their only disability) who are truly in need of a residential placement. Thus, the court could be saying that without an allegation, and some evidence, that the plaintiff in fact shows a reasonable likelihood of having standing to sue under the EAHCA, the court will require exhaustion of administrative remedies.

Another situation in which there was difficulty in implementing the exhaustion exception is found in *Antkowiak v. Ambach*.[32] In that case, a school district recommended a private, out-of-state residential program as placement for an emotionally disturbed youngster. The Commissioner, who under state law was the only one with authority to make out-of-state placements, refused to effectuate the out-of-state placement because, at the time the IEP was prepared, that out-of-state placement was not on his approved list. The plaintiff complained that not only did the Commissioner refuse to make the out-of-state placement, but he in fact did nothing, thereby precluding the plaintiff's child from obtaining *any* placement. The plaintiff further complained that although he searched the state's list of approved schools, he found none that could provide an appropriate education for his daughter. Thus, the plaintiff proceeded directly to court seeking injunctive relief. The Commissioner of Education defended by claiming that the plaintiff had first to exhaust the administrative remedies under the EAHCA. The district court ruled that exhaustion was required, despite the fact that the hearing was at the local level and was thus between the parents and the school district, whereas the plaintiff was complaining of the actions of the SEA, which was not a party to the hearing. Thus, the plaintiff was required to pursue and exhaust administrative remedies against a party against whom he had no complaint (the school district) before becoming able to pursue the party against whom he did have a complaint (the SEA).[33]

III. Statutes of Limitations

The EAHCA does not specify a statute of limitations setting forth a time frame within which a party must file suit in court. The general rule is that when a federal statute does not provide for its own statute of limitations the court will look to the most appropriate, or analogous, state statute of limitations.[34] This has led to different statutes of limitations being applied in lawsuits arising under the EAHCA, depending upon the particular state in which the action arose. The following chart sets out the statutes of limitations that have been applied in various states.

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[31] *See* note 13 of this chapter, *supra*.

[32] 621 F. Supp. 975 (W.D.N.Y. 1985), 1985-86 EHLR 557:160.

[33] *See also, Lombardi v. Ambach*, 522 F. Supp. 867 (E.D.N.Y. 1981), 1980-81 EHLR 552:486 (parent required to proceed to due process hearing with the LEA despite the fact that dispute was with the SEA).

[34] *See, e.g., Del-Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S. Ct. 2281 (1983).

Statutes of Limitations by Jurisdiction

Jurisdiction State	Statute of Limitations Period	Case and Finding: Analogous State Statute of Limitations
California	3 years	*Alexopulos v. San Francisco Unified School District*, 817 F.2d 551 (9th Cir. 1987), 1986-87 EHLR 558:411: statute of limitations for statutory causes of action.
District of Columbia	30 days	*Spiegler v. District of Columbia*, 866 F.2d 461 (C.A.D.C. 1989), 15 EHLR 441:305: statute of limitations for administrative appeals.
Hawaii	30 days	*Department of Education, Hawaii v. Carl D.* 695 F.2d 1154 (9th Cir. 1983), 1982-83 EHLR 554:301: statute of limitations for administrative appeals.
Massachusetts	30 days	*School Committee of Franklin v. Commissioner of Education*, 482 N.E. 2d. 796, 395 Mass. 800 (Sup. Jud. Ct. Mass. 1985), 1985-86 EHLR 557:168: statute of limitations for administrative appeals.
Nebraska	3-4 years	*Monahan v. Nebraska*, 491 F. Supp. 1074 (D.Neb. 1980),1980-81 EHLR 552:207, *mod. on other grounds*, 645 F.2d 592 (8th Cir. 1981), 1980-81 EHLR 552:380, *cert. denied*, 460 U.S. 1012 (1983): statute of limitations for an action upon liability created by federal statute or unspecified action.
New Hampshire	3 years	*James v. Nashua School District*, 720 F. Supp. 1053 (D.N.H. 1989), 15 EHLR 441:627: statute of limitations for a personal cause of action for which no other statute of limitations is prescribed.
New York	4 months	*Adler v. Education Department*, 760 F.2d 454 (2d Cir. 1985), 1984-85 EHLR 556:397: statute of limitations for administrative appeals.
	3 years	*Robert D. v. Sobol*, 688 F. Supp. 861 (S.D.N.Y. 1988) (application for attorneys' fees as prevailing party in administrative proceedings): statute of limitations for an action upon liability created or imposed by statute.
Pennsylvania	2 years	*Tokarcik v. Forest Hill School District*, 665 F.2d 443 (3d Cir. 1981), 1980-81 EHLR 552:513, *cert denied*, 458 U.S. 1121 (1982): statute of limitations for an action to recover damages for personal injury from wrongful/negligent act.
Tennessee	3 years	*Janzen v. Knox Co. Board of Education*, 790 F.2d 484 (6th Cir. 1986), 1985-86 EHLR 557:329: statute of limitations for an action for services performed but not paid.

	60 days	*Doe v. Smith*, 16 EHLR 65 (M.D. Tenn. 1989): statute of limitations for review of agency determinations concerning non-reimbursement issues.
Texas	2 years	*Scokin v. Texas*, 723 F.2d 432 (5th Cir. 1984), 1983-84 EHLR 555:385: statute of limitations for a tort claim.
Virginia	1 year	*Schimmel v. Spillane*, 819 F.2d 477 (4th Cir. 1987), 1986-87 EHLR 558:331: statute of limitations for a personal cause of action for which no other statute of limitations is prescribed.
West Virginia	120 days	*Thomas v. Staats*, 633 F. Supp. 797 (S.D. W.Va. 1985), 1985-86 EHLR 557:300: statute of limitations for an application for writ of certiorari to review administrative action.

A court's declaration of the appropriate state statute of limitations for EAHCA actions may not be sufficient, however, to determine whether a claim is time barred. For example, when a state statute of limitations is applied to the EAHCA, other related state rules—such as tolling of the statute of limitations—may also be applicable.[35]

In those states in which a court has not spoken, parties are left with little guidance. Courts in a few states have indicated what *is not* the statute of limitations, however, even where they have not defined what the applicable limitations period *is*.[36]

IV. Judicial Review

The EAHCA specifically provides that any party who is dissatisfied with the final administrative decision concerning a handicapped child may initiate a lawsuit in the appropriate state or federal court.[37] The Act further provides:

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[35] Compare *Shook v. Gaston County Board of Education*, 882 F.2d 119 (4th Cir. 1989), 15 EHLR 441:561 (state tolling of statute of limitations during period of minority is applicable to EAHCA actions), with *Alexopulos v. San Fransciso Unified School District*, 817 F.2d 551 (9th Cir. 1987), 1986-87 EHLR 558:411 (state tolling provision was held contrary to federal policy that EAHCA rights be promptly asserted).

[36] *See, e.g., Flavin v. Connecticut State Board of Education*, 553 F. Supp. 827 (D. Conn. 1982), 1982-83 EHLR 554:328 (rejecting statute of limitations applicable to appeals from decisions of a state hearing officer (45 days)); *Max M. v. Thompson*, 566 F. Supp. 1330 (D. Ill. 1983), 1983-84 EHLR 555:194 (rejecting statute of limitations applicable to review of administrative agency of appeals (35 days)).

See also Edward B. v. Brunelle, 662 F. Supp. 1025 (D.N.H. 1986) (upholding a federal court action brought 64 days after a due process hearing decision; no specific statute of limitations applied).

[37] 20 U.S.C.A. §1415(e) (1990). It should be noted, however, that LEAs have been held to lack standing to pursue a court action in the absence of a dispute with a handicapped child or parent. *See, e.g., Andrews v. Ledbetter*, 880 F.2d 1287 (11th Cir. 1989), 15 EHLR 441:573 (LEAs that complained that

> In any [such] action . . . the court shall receive the records of the administrative procedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.[38]

The Supreme Court provided further guidance concerning the role of the courts in actions arising under the EAHCA by describing the court's inquiry as twofold: (1) to determine whether the educational agency has complied with the procedural requirements of the Act; and (2) to determine whether the IEP for the child is reasonably calculated to enable the child to receive educational benefits.[39] The Supreme Court cautioned, however, that although a court should render its decision based upon the preponderance of the evidence, this is not "an invitation to the courts to substitute their own notions of sound educational policy for those of school authorities which they review."[40] The Supreme Court added that because the Act directs the court to receive the records of the administrative procedings, this "carries with it the implied requirement that due weight shall be given to these proceedings."[41]

The Supreme Court's discussion of this issue in *Board of Education of the Hendrick Hudson School District v. Rowley*, although providing some guidance, has raised some questions. The first, and much litigated, question concerns the appropriate scope of judicial review: how much weight is "due weight"? The second question is: to whom does the court owe due weight?

A. Scope of Review

Traditionally, when a court reviews administrative decisions, it gives great deference to the administrative decisionmaker. In such an instance the court views itself as performing an appellate function. Since the EAHCA calls for the court to

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state's failure to provide necessary residential placement services precluded LEAs from offering a FAPE to children with severe handicaps lacked standing to pursue a judicial proceeding under the EAHCA); *Seneca Falls Central School District v. Liverpool Central School District*, 728 F. Supp. 910 (W.D.N.Y. 1990), 16 EHLR 494 (where parents had not pursued their rights under the EAHCA, LEA lacked standing to invoke stay-put provision against another school district with which LEA had contracted for placement).

An additional limitation upon a party's ability to pursue a lawsuit arises from the well-established legal principle that courts will not entertain lawsuits where the issue in controversy has become moot. *See, e.g., Monohan v. Nebraska*, 687 F.2d 1164 (8th Cir. 1982), 1982-83 EHLR 554:140 (handicapped woman's complaint concerning LEA's alleged failure to provide her with a proper placement was moot because she had reached the age of majority, married and moved out of the school district).

[38] 20 U.S.C.A. §1415(e)(2) (1990).

[39] *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982), 1981-82 EHLR 553:656. For a more detailed discussion of the holding in this case, *see* chapter 16 of this text, *infra*.

[40] 458 U.S. at 206, 102 S. Ct. at 3051, 1981-82 EHLR at 553:670.

[41] *Id.*

base its decision upon a preponderance of the evidence, however, it is at least implied that in EAHCA cases the court is not sitting in a stereotypical appellate role.[42] Thus, numerous courts have in fact interpreted the Act's language as calling for *de novo* proceedings by the district court.[43] Other courts have described the court's responsibility in such suits as requiring an independent decision.[44]

It is not clear from these latter decisions whether describing the court's role as requiring an independent decision is equivalent to describing it as requiring *de novo* proceedings. The stated responsibility to render independent decisions apparently is in recognition of the Supreme Court's reference to congressional intent "that courts were to make'independent decision[s] based on a preponderance of the evidence'."[45]

A few courts, however, have actually limited the role of the judiciary and granted deference to all or some of the administrative decisions.[46] A leading case holding that considerable deference must be given to final administrative decisions is *Karl v. Board of Education of Geneseo Central School District*.[47] That case involved a dispute between parents and the LEA concerning the proper staff-to-student ratio at the applicable program for a mentally retarded girl. The local level hearing officer ruled (at least in part) in favor of the ratio requested by the parents, but on appeal the Commissioner of Education reversed that decision. The district court overruled the Commissioner and the Second Circuit reversed the district court. In so doing, the Second Circuit stated: "We believe *Rowley* requires that federal courts defer to the final decision of the state authorities. . . ."[48]

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[42] An appellate court simply reviews the evidence presented to the court below. It does not hear new evidence.

[43] A *de novo* hearing is one in which the court hears the matter as a court of original, not appellate, jurisdiction. The court in effect tries the matter anew.

See, e.g., Lachman v. Illinois State Board of Education, 852 F.2d 290 (7th Cir. 1988), 15 EHLR 441:156; *Gregory K. v. Longview School District*, 811 F.2d 1307 (9th Cir. 1987), 1986-87 EHLR 558:284; *Wilson v. Marana Unified School District No. 6 of Pima County*, 735 F.2d 1178 (9th Cir. 1984), 1984-85 EHLR 556:101; *Roncker v. Walters*, 700 F.2d 1058 (6th Cir. 1983), 1982-83 EHLR 554:381; *Doe v. Anrig*, 692 F.2d 800 (1st Cir. 1982), 1982-83 EHLR 554:271; *Kruelle v. New Castle County School District*, 642 F.2d 687 (3d Cir. 1981), 1980-81 EHLR 552:350; *Bonadonna v. Cooperman*, 619 F. Supp. 401 (D.C.N.J. 1985), 1985-86 EHLR 557:178; *School Committee of Franklin v. Commissioner of Education*, 462 N.E. 2d 338 (Ct. App. Mass. 1984), 1983-84 EHLR 555:487.

[44] *See, e.g., Burke County Board of Education v. Denton*, 895 F.2d 973 (4th Cir. 1990), 16 EHLR 432; *Jefferson County Board of Education v. Breen*, 864 F.2d 795 (11th Cir. 1988), 15 EHLR 441:184; *School Board of the County of Prince William, Virginia v. Malone*, 762 F.2d 1210 (4th Cir. 1985), 1984-85 EHLR 556:406; *Abrahamson v. Hershman*, 701 F.2d 223 (1st Cir. 1983), 1982-83 EHLR 554:403; *Geis v. Board of Education of Parsippany Troy-Hills*, 589 F. Supp. 269 (D.C.N.J. 1984), 1984-85 EHLR 556:208; *Beasley v. School Board of Campbell County*, 367 S.E.2d 738 (Va. App. 1988), 1987-88 EHLR 559:458 (Ct. App. Va. 1988), *rev'd on other grounds*, 15 EHLR 441:603 (Va. Sup. Ct. 1989).

[45] *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 205, 102 S. Ct. 3034, 3050 (1982), 1982-83 EHLR 553:656, 669, quoting S. Conf. Rep. No. 94-455, 50 (1975), reprinted in 1975 *U.S. Code Cong. and Admin. News*. 1425.

[46] *See, e.g., Karl v. Board of Education of Geneseo Central School District*, 736 F.2d 873 (2d Cir. 1984), 1983-84 EHLR 555:556 (deference should be given to final decision of state authorities); *Bertolucci v. San Carlos Elementary School District*, 721 F. Supp. 1150 (N.D. Cal. 1989), 15 EHLR 441:587 (deference should be given to administrative decision that is supported by a preponderance of evidence and based on sound application of law, particularly where questions of education methodology and programming are involved); *Tolland Board of Education v. Connecticut State Board of Education*, 1984-85 EHLR 556:412, (D.C. Conn. 1985) ("the court's task . . . is to determine whether the hearing officer's decision is supported by a preponderance of the evidence presented to him and to the court"). *See also, Briggs v. Board of Education of the State of Connecticut*, 882 F.2d 688 (2d Cir. 1989), 15 EHLR 441:592 (deference is owed to state and local agencies with expertise in formulation of educational programs for the handicapped). However, *see* discussion in chapter 16 of this text concerning the *Briggs* case and questions about its underlying reasoning.

One commentator has suggested that it is possible to reconcile *Karl* with many cases that appear to hold to the contrary.[49] Under that commentator's analysis, decisions by hearing officers and judges can be divided into four categories: purely historical fact decisions, strictly policy questions, factual questions concerning appropriateness for a particular child and legal questions. When applying this analysis to *Karl*, the issue before the court can be characterized as a policy question (appropriate staffing). The *Karl* decision may then be viewed as being limited to requiring significant deference to state administrative decisions *in policy matters*.

Another area of litigation involving the scope of judicial review concerns evidentiary matters. At least one court has held that if additional evidence is necessary when the parties appear before the court, a remand back to the administrative process for taking such evidence is not recommended, at least when the basic issue or controversy is the same as that addressed in the administrative process.[50] Another court, however, has viewed the court's evidentiary responsibilities as limited to reviewing evidence that is merely supplemental to that taken in the administrative process.[51]

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[47] 736 F.2d 873 (2d Cir. 1984), 1983-84 EHLR 555:556.

[48] 736 F.2d at 877, 1983-84 EHLR at 555:559.

[49] T.F. Guernsey, "When the Teachers and Parents Can't Agree, Who Really Decides? Burdens of Proof and Standards of Review Under the Education for All Handicapped Children Act," 36 *Cleveland State Law Review*, 67 (1988).

[50] *De Vries v. Spillane*, 853 F.2d 264 (4th Cir. 1988), 15 EHLR 441:175 (where the original IEP proposed by the LEA called for continuation of placement at a private special education school and the parents sought placement at a neighborhood school, and when by the time of court action the LEA proposed a public school program at other than the neighborhood school and the parents' position remained unchanged, the district court should not remand but should take additional evidence).

[51] *Roe v. Town of Westford*, 110 F.R.D. 380 (D.C. Mass. 1986), 1985-86 EHLR 557:410 (in the context of a motion for protective order concerning a deposition of the LEA special education coordinator who had already testified at the due process hearing, the court held that only supplemental evidence is admissible at a trial and there is thus a rebuttable presumption that a person who testified at the hearing will not testify at court; to permit additional evidence that is not supplemental would change the character of the hearing from one of review to a trial *de novo*).

B. Right to Trial by Jury

An issue that apparently has not yet been addressed by the courts is whether a party has a right to a trial by jury in an action arising under the EAHCA. This matter may be unlitigated because most courts called upon to resolve EAHCA actions have faced issues that are either primarily legal or mixed questions of law and fact. It is unclear whether a party would be entitled to demand that a matter involving a purely factual question be resolved by a jury. Traditionally the issues of FAPE and LRE have been treated as mixed questions of law and fact. The authors are unaware of any case that has considered whether either of these issues (in whole or part) could be treated as a factual question giving rise to a right to jury review.

C. Due Weight—Given to Whom?

Like the question of how much weight is due weight, there is also a lack of consensus among the courts as to whom (or to what) such due weight should be given. The Supreme Court stated in *Rowley* that the Act's requirement that the records of the administrative proceedings be received by the Court "carries with it the implied requirement that due-weight shall be given to these [administrative] proceedings."[52] The Court's reference to administrative proceedings has resulted in a number of interpretations. Most lower courts have held that due weight should be given to the final administrative decision,[53] but at least one court has held that due weight should be given to the decisions of school officials.[54] At least one other court has held that when the LEA has complied with the procedural requirements under the Act, more weight is due its administrative decision.[55] Yet another court has gone so far as to state that no deference or weight should be given to administrative decisions when there is a conflict between the local hearing officer and the state hearing officer in a state with a two-tier administrative system.[56]

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[52] 458 U.S. at 206, 102 S. Ct. at 3051 (1982), 1981-82 EHLR at 553:670.

[53] *See, e.g., Karl v. The Board of Education of the Geneseo Central School District*, 736 F.2d 873 (2d Cir. 1984), 1983-84 EHLR 555:556; *School Board of the County of Prince William, Virginia v. Malone*, 762 F.2d 1210 (4th Cir. 1985), 1984-85 EHLR 556:406; *Roncker v. Walters*, 700 F.2d 1058 (6th Cir. 1983), 1982-83 EHLR 554:381; *Bertolucci v. San Carlos Elementary School District*, 721 F. Supp. 1150 (N.D. Cal. 1989), 15 EHLR 441:587; *Tolland Board of Education v. Connecticut State Board of Education*, 1984-85 EHLR 556:412 (D.C. Conn. 1985).

[54] *McKenzie v. Smith*, 771 F.2d 1527 (D.C. Cir. 1985), 1985-86 EHLR 557:119 (due weight is to be given to school officials, but where their expertise has not been brought to bear on the individual needs of a handicapped child, the deference given will be commensurately lower).

[55] *Roncker v. Walters*, 700 F.2d 1058 (6th Cir. 1983), 1982-83 EHLR 554:381.

[56] *Bonadonna v. Cooperman*, 619 F. Supp. 401 (D.C.N.J. 1985), 1985-86 EHLR 557:178 (no deference or weight need be given to administrative proceedings when the two prior hearing decisions are inconsistent).

V. Burden of Proof

In an adversarial proceeding, one party typically has the burden of proof with respect to each issue to be resolved. That party must convince the decisionmaker to rule in his or her favor. Thus, for example, if the burden of proof is a preponderance of the evidence—the most typical burden in non-criminal matters—the party with the burden of proof will lose if the decisionmaker is unable to conclude that that party's evidence outweighs the evidence presented to the contrary by his or her adversary.

A. Burden of Proof in Administrative Hearings

There is very little, if any, case law determining which party has the burden of proof in due process hearings. For the most part it has been left to each state to establish its own rules in this regard. Several different approaches have been exercised, including (1) placing the burden of proof on the LEA to establish the appropriateness of a recommended placement,[57] (2) placing the burden on the party proposing a change in placement,[58] and (3) placing the burden on the party opposing a change in placement when such opposition would result in a more restrictive placement.[59]

A further nuance that has been applied in some jurisdictions involves assigning the burden of proceeding to the LEA, which requires the LEA to present its evidence prior to the time that evidence is presented by parents of a disabled child.[60] In the authors' opinion, placing the burden of proceeding on the LEA is appropriate—regardless of who is assigned the burden of proof. Such a procedure makes practical sense for two reasons: (1) hearings generally arise as a result of parental disagreement with the recommendation of the LEA, and thus the LEA should first justify its recommendation; and (2) since the evaluators upon whom the LEA relied in making its recommendation will ultimately have to testify, it is efficient and logical to have this evidence put into the record first.

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[57] *See, e.g.*, SEA decision, Case No. 11966 (N.Y. 1988), 1987-88 EHLR 509:271 (an LEA has the burden of establishing the appropriateness of a recommended placement).

[58] *See, e.g.*, SEA decision, Case No. 1984-14 (Ga. 1985), 1984-85 EHLR 506:291 (the burden of proof is usually on the party proposing a change in placement); SEA decision, Case No. 299 (Pa. 1986), 1986-87 EHLR 508:242 (LEA has burden to show that proposed change is appropriate).

[59] *See, e.g.*, SEA decision, Case No. 1984-14 (Ga. 1985), 1984-85 EHLR 506:291 (although the general rule is that the burden of proof is on the party proposing a change in placement, the burden of proof is on the party opposing a change in placement when such opposition favors a more restrictive placement).

[60] SEA decision, Case No. 48 (Wisc. 1984), 1984-85 EHLR 506:248 (the LEA has the burden of proceeding since it must prove compliance with the procedural requirements of the EAHCA).

B. Burden of Proof in Court Proceedings

The courts have generally followed two different approaches in allocating the burden of proof in judicial proceedings under the EAHCA. One approach is to view a judicial proceeding under the Act essentially as an appeal of an administrative proceeding, thus placing the burden of proof on the party seeking to overturn the administrative decision.[61] Under the second approach, courts have apparently drawn some direction from the stay-put principle[62] and have assigned the burden of proof to the party seeking to change the present placement or status quo.[63] At least one court, however, has held that the LEA always has the burden of proving the appropriateness of the IEP—regardless of whether it is the LEA or the parents that is seeking the change.[64] It is important to note, though, that when assessing the likelihood of success in a prospective court proceeding, a party must not limit his or her consideration solely to the burden-of-proof question. Application of the burden of proof must be considered in conjunction with the applicable court's view of its role as a judicial reviewer, as was explained earlier in this chapter.[65]

VI. Stay-Put (Status Quo) Provision

The commonly known stay-put or status quo provision of the EAHCA provides that: "During the pendency of any proceedings. . . , unless the . . . educational agency and the parents . . . otherwise agree, the child shall remain in the then current educational placement of such child. . . ."[66] Without such a limitation, a child's educational programming could become chaotic, especially if it were altered each time someone requested a change or if placement depended upon each of the various interim decisions issued by a hearing officer, administrative appeals officer, judge, and so forth. The underlying principle of this provision is to continue the child's "then current" placement (the placement in existence before the dispute arose) until the dispute is ultimately resolved.

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[61] *See, e.g., Kerkam v. McKenzie*, 862 F.2d 884 (D.C. Cir. 1988), 15 EHLR 441:311 (parents seeking to overturn an administrative decision have the burden of persuading the court that the hearing officer's decision was erroneous); *Barwacz v. Michigan Department of Education*, 674 F. Supp. 1296 (W.D. Mich. 1987), 1987-88 EHLR 559:346 (following the general rule of agency appeals, a parent seeking to overturn an administrative hearing review decision bears the burden of proof); *Tracey T. v. McDaniel*, 610 F. Supp. 947 (N.D. Ga. 1985), 1984-85 EHLR 556:496 (parents appealing an administrative proceeding upholding the IEP bear the burden of proof).

[62] 20 U.S.C.A. §1415(e)(3) (1990).

[63] *See, e.g., Doe v. Brookline School Committee*, 722 F.2d 910 (1st Cir. 1983), 1983-84 EHLR 555:268 (the burden of proof is on the party seeking to change the status quo); *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983), 1982-83 EHLR 554:469, 474 (same), *aff'd. on other grounds, Irving Independent School District v. Tatro*, 468 U.S. 883, 104 S. Ct. 3371 (1984), 1983-84 EHLR 555:511; *Burger v. Murray County School District*, 612 F. Supp. 434 (N.D. Ga. 1984), 1984-85 EHLR 556:403 (the party seeking to change an educational placement has the burden of showing the propriety of the proposed new placement); *Lang v. Braintree School Committee*, 545 F. Supp. 1221 (D. Mass. 1982), 1982-83 EHLR 554:161 (the burden of proof is on the party seeking to change the status quo); *Bales v. Clarke*, 523 F. Supp. 1366 (E.D. Va. 1981), 1981-82 EHLR 553:209 (parents seeking to change placement bear the burden of proof).

[64] *Lascari v. Ramapo Indian Hills Regional High School District*, 560 A.2d 1180 (Sup. Ct. N.J. 1989), 15 EHLR 441:565 (in suit by parents for reimbursement of expenses for unilateral private placement, LEA had the burden of proving the adequacy of the IEP).

[65] *See* section IV of this chapter, *supra*.

Despite the desire to maintain stability and continuity for a handicapped child, there is no language in the EAHCA, nor any indication in its legislative history, that the law was intended to limit the traditional deference to parents in making significant decisions for their children. Parental prerogative to decide whether to enroll a child in the local school district or in some other acceptable educational situation remains. Thus, the stay-put provision effectively operates only to limit the actions of the school district, except to the extent that a handicapped child's parents are unable to place the child elsewhere due to limited funds or the unavailability of an alternate placement.[67]

The status quo that must be maintained is the placement in effect when the complaint (request for a hearing) was filed.[68] In other words, it is the last uncontested status that preceded the controversy.[69] This status quo must be maintained for as long as the review proceedings continue,[70] unless a court determines that a preliminary injunction directing otherwise is warranted.[71] In effect, therefore, the stay-put provision of the EAHCA acts as an *automatic* preliminary injunction.[72] It is *automatic* because the mere request for a hearing requires maintaining, not changing, the child's placement. There is no requirement to demonstrate a probability of success on the merits, which is typically a prerequisite to the granting of a preliminary injunction.[73] Accordingly, whenever a school district enters into an agreement to provide funding for a placement, even for a limited time period, such an agreement may establish the status quo for which the district must provide ongoing funding if there is a later disagreement concerning continuing that placement.[74]

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[66] 20 U.S.C.A. §1415(e)(3) (1990).

[67] Parents who make a unilateral placement choice do not thereby create a new stay-put placement that must be funded, however. *See e.g., Schimmel v. Spillane*, 630 F. Supp. 159 (E.D. Va. 1986), 1985-86 EHLR 557:238, *aff'd*, 819 F.2d 477 (4th Cir. 1987), 1986-87 EHLR 558:331; *Cain v. Yukon Public School District, I-27*, 556 F. Supp. 605 (W.D. Okla. 1983), 1982-83 EHLR 554:418; *Stacey G. v. Pasadena Independent School District*, 695 F.2d 949 (5th Cir., 1983), 1982-83 EHLR 554:296.

When the parents can afford the ongoing costs of a unilateral placement, however, they can eventually be reimbursed if they pursue their remedies to completion and are ultimately the prevailing party. *School Committee of Town of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S. Ct. 1996 (1985), 1984-85 EHLR 556:389.

[68] *See, e.g., Monahan v. Nebraska*, 491 F. Supp. 1074 (D. Neb. 1980), 1980-1981 EHLR 552:207, *aff'd in part, rev'd in part on other grounds*, 645 F.2d 592 (8th Cir. 1981), 1980-1981 EHLR 552:380 (for one plaintiff [Monahan] the then current placement was at an elementary school paid for by parents—this arrangement was maintained by the court; for a second plaintiff [Rose], the court ordered that the child be maintained at a junior high school at the expense of the school district). *See also, Leonard v. McKenzie*, 869 F.2d 1558 (D.C. Cir. 1989), 15 EHLR 441:361 (although LEA had offered an appropriate public school placement for handicapped child, it was required to pay costs of a unilateral private school placement for the remainder of the school year because the LEA had committed certain procedural violations; nonetheless, for purposes of the "stay-put" provision, the child's placement was the public school placement).

[69] *See, e.g., Grkman v. Scanlon*, 528 F. Supp. 1032 (W.D. Pa. 1981), 1981-82 EHLR 553:508 (requiring maintenance of a school-aged deaf child in the private school she had attended as a preschooler with approval of LEA).

[70] *But see, Andersen v. District of Columbia*, 877 F.2d 1018 (D.C. Cir. 1989), 15 EHLR 441:508, where the court held that the status quo does not apply to judicial appeals if the trial court

Despite the stay-put proviso, if the parents and education agency otherwise agree, the child may be placed into any mutually agreeable placement while the present dispute continues.[75] This enables educators and parents to consider the best interests of the child without concern for the legal ramifications of such an educational decision. An agreement to maintain the child or to move the child to some particular educational placement while litigation ensues does not then create a new status quo, so long as both parties understand and agree that it is for the limited purpose of an interim placement until the dispute is finally resolved.

The latter procedure can also be utilized in situations in which both the parents and the agency agree that the "then current placement" cannot practically

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renders a decision approving the change, unless the trial court grants an injunction independent of the stay-put provision.

[71] *See, e.g., Kantak v. Liverpool Central School District*, 16 EHLR 643 (N.D.N.Y. 1990) (deaf child granted a preliminary injunction to be provided with a full-time teacher of the deaf based upon showing of irreparable harm and likelihood of success on the merits).

[72] *See, e.g., Zvi D. v. Ambach*, 694 F.2d 904 (2d Cir. 1982), 1982-1983 EHLR 554:226 (the stay-put provision is an automatic injunction for placement agreed to between the LEA and the parents; in this case, however, the LEA never agreed to pay, and was not paying, for the plaintiff's private placement, and thus the stay-put provision did not apply).

[73] *See, e.g., Abrahamson v. Hershman*, 1980-81 EHLR 552:289 (D. Mass. 1981), *aff'd*, 701 F.2d 223 (1st Cir. 1983) (handicapped child to remain in residential program despite no showing of probability of success on merits).

[74] *See, e.g., Jacobsen v. D.C. Board of Education*, 564 F. Supp. 166 (D.D.C. 1983), 1983-84 EHLR 555:163 (LEA's agreement to assume financial responsibility of unilateral placement without specifically limiting LEA's financial obligation to that school year required continued funding of that placement during pendency of administrative and judicial proceedings).

[75] 20 U.S.C.A. §1415(e)(3) (1990) states: "During the pendency of any proceedings . . ., *unless the state or local educational agency and the parents . . . otherwise agree*, the child shall remain in the then current placement. . . ." (emphasis added).

See also, Kantak v. Liverpool Central School District, 16 EHLR 643 (N.D.N.Y. 1990) (despite appeal of state level hearing decision by LEA, SEA administrative decision in favor of parents' requested change of placement was held to be an agreement between the parents and the SEA under 20 U.S.C. §1415(e)(3), that was immediately enforceable in court); *Blazejewski v. Board of Education of Alleghany Central School District*, 560 F. Supp. 701 (W.D.N.Y. 1983), 1982-83 EHLR 554:426 (same).

be maintained.[76] Considerable difficulty arises, however, when the "then current placement" cannot practically be maintained or no longer exists and the parties do not agree on where to place the child. The case law to date provides little guidance with respect to this situation other than to suggest that parents and school districts look for the closest practical approximation to the previous placement.[77]

The "then current placement" that must be maintained is the general nature of that placement, not each and every single element of it.[78] For instance, a change in the location of the program, in and of itself, has been held not to constitute a change in placement.[79] It is the nature of the placement, rather than all of its particulars, that is addressed by the stay-put provision.[80] On the other hand, it has been held that a change in program that will *substantially* or *significantly* affect the programs and services being provided to the child constitutes a change in placement.[81] Such a change is not permitted.[82] Indeed, one court has permitted a handicapped student to continue in his educational program after he graduated when the youth challenged the propriety of the graduation.[83]

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[76] *See e.g., Newmarker v. Kirk*, 1983-84 EHLR 555:477 (D. Del. 1984).

[77] *See, e.g., McKenzie v. Smith*, 771 F.2d 1527 (D.C. Cir. 1985), 1985-86 EHLR 557:119 (when private special education day school where handicapped child was attending was no longer available, the LEA was obligated to locate and arrange placement in a similar program—a day program in a special education facility); *Knight v. District of Columbia*, 691 F. Supp. 1567 (D.D.C. 1988), 15 EHLR 441:214 (when private school attended by handicapped child was no longer appropriate and parents objected to public school placement proposed by the LEA, LEA was obligated to locate and arrange placement at a private school in the interim).

[78] *See, e.g., Abrahamson v. Hershman*, 1980-81 EHLR 552:289 (D.C. Mass. 1981), *aff'd*, 701 F.2d 223 (1st Cir. 1983) (child to be maintained at same residential location even though another entity had taken over the facilities of plaintiff's previous private school and would presumably operate the system somewhat differently).

[79] *See, e.g., Concerned Parents & Citizens for Continuing Education at Malcolm X v. New York City Board of Education*, 629 F.2d 751 (2d Cir. 1980), 1980-81 EHLR 552:147 (transfer of handicapped children from one public school building to another does not constitute a change in placement); *Brown v. D.C. Board of Education*, 1979-80 EHLR 551:101 (D.D.C. 1978) (transfer of deaf-blind children from regular school building to special education building due to monitoring report calling for more support services does not constitute a change in placement).

[80] *See, e.g., Tilton v. Jefferson County Board of Education*, 705 F.2d 800 (6th Cir. 1983), 1982-83 EHLR 554:513 (reassignment of emotionally handicapped children to a 180-day per year program after closing of previous 12-month program constituted a change in placement because the placements were not comparable).

[81] *See, e.g., DeLeon v. Susquehannna Community School District*, 747 F.2d 800 (6th Cir. 1984), 1984-85 EHLR 556:261 (change in who drove handicapped child and addition of other children in vehicle did not significantly affect child's learning experience so as to constitute a change in placement); *Brookline School Committee v. Golden*, 628 F. Supp. 113 (D. Mass. 1986), 1985-86 EHLR 557:273 (superficial adjustments to after-school program did not constitute a change in placement because they did not significantly affect the handicapped child's learning experience); *Gebhardt v. Ambach*, 1982-83 EHLR 554:130 (W.D.N.Y. 1982) (reduction of twelve-month program to ten-month program was of sufficient magnitude to constitute change of placement); *Sherry v. New York State Education Department*, 479 F. Supp. 1328 (W.D.N.Y. 1979), 1979-80 EHLR 551:519 (indefinite suspension of handicapped child was a significant change and constituted a change in educational placement).

[82] *See, e.g.*, OSEP Policy Letter, EHLR 211:233 (1980) ("where . . . a material or substantial change in the educational placement or the provision of a free appropriate public education would be entailed, the notice and hearings requirements would apply").

There is some disagreement as to whether a placement that does not satisfy the SEA standards must be maintained. The Act provides that a placement must not only meet the standards set forth in the EAHCA and its regulations, but must also satisfy the particular standards established by the SEA.[84] In some states, for instance, there is an approved list of certified schools that are authorized to provide education for handicapped children. Some courts have held that if a school was at one time certified, or if for some other reason such a school was agreed to be the appropriate placement for a child, the LEA or SEA cannot later claim the school's lack of certification as a justification for not maintaining the status quo.[85] At least one court has held, however, that if the "then current placement" is not on the SEA-approved list, the parent is not entitled to maintain that placement as the status quo.[86]

In the authors' view, the better procedure in this situation is to permit maintenance of placement regardless of whether the state educational standards (such as placement on an approved list) are being met, since the parties involved (school district and parents) were previously in agreement concerning the appropriateness of that placement. Otherwise, the interest in minimizing disruption to the educational programming of the child, which underlies the stay-put provision, will be undermined. Of course, if it can be shown that the child would be harmed by continued maintenance of the placement, particularly because of the program's failure to meet the state educational standards, alternate arrangements should be made.

The "then current placement" may not be discontinued by subterfuge or back-door activity. Accordingly, withdrawal of funding, although not a direct change of placement, has been held impermissible, since in effect it results in a change in placement.[87] At least one court has held, however, that if a program is discontinued for purely budgetary reasons, the school district is not required to maintain a child in that program.[88] This latter decision, if carried to its logical conclusion, could run afoul of the protections of the EAHCA, particularly the stay-put provision. Care must be taken to comply with the requirement that the education agency ensure the availability of a continuum of alternative placements to meet the unique needs of handicapped children.[89]

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[83] *Cronin v. Board of Education of East Ramapo Central School District*, 689 F. Supp. 197 (S.D.N.Y. 1988), 15 EHLR 441:124 (handicapped child who challenged appropriateness of graduation was entitled to remain in his educational program during the pendency of administrative proceedings).

[84] 20 U.S.C.A. §1401(a)(18)(B) (1990).

[85] *See, e.g., VanderMalle v. Ambach*, 673 F.2d 49 (2d Cir. 1982), 1981-82 EHLR 553:589, (certification of school discontinued); *Bevilacqua v. Board of Education of City of Niagara Falls*, 1982-83 EHLR 554:410 (W.D.N.Y. 1983) (preschool program not certified for school-age children).

[86] *Dima v. Macchiarola*, 1980-81 EHLR 552:438 (E.D.N.Y. 1981).

[87] *See, e.g., Grymes v. Madden*, 672 F.2d 321 (3d. Cir. 1982), 1981-82 EHLR 553:546, (continued public funding of private school placement); *Leo P. v. Board of Education School District No. 230*, 1981-82 EHLR 553:644 (N.D. Ill. 1982) (continued public funding of out-of-state private school placement).

Another issue involves situations in which a temporary change in placement has arguably become more than temporary. When circumstances result in a change for a period longer than one month, this may be considered an inappropriate change of placement and thus a violation of the stay-put requirement.[90] Similarly, a long-term suspension (greater than ten days) is considered a change of placement that violates a child's stay-put rights.[91]

VII. Discipline

Initially, there was disagreement as to whether the EAHCA played a role in limiting school districts' traditional authority to administer discipline to students. Before enactment of the EAHCA, that disciplinary authority had clearly been limited only by particular state statutes specifying the procedures to be followed and, in certain circumstances, by the constitutional requirement of minimum due process.[92] The stay-put provision in the EAHCA,[93] however, prohibits a school district from unilaterally changing a handicapped child's placement. What was initially unclear after enactment of the EAHCA was whether an expulsion or long-term suspension of a handicapped child amounted to a "change of placement," which would trigger the need to adhere to the procedural safeguards set forth in the Act and to impose the protections of the stay-put provision. In *Honig v. Doe*[94] the Supreme Court addressed this issue.

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[88] *Tilton v. Jefferson County Board of Education*, 705 F.2d 800 (6th Cir. 1983), 1982-83 EHLR 554:513.

[89] 34 C.F.R. §300.551 (1988) requires the availability of a continuum of alternative placements. If a program is discontinued for purely budgetary reasons and is not replaced by an equivalent program, a parent could complain that the budgetary decision has left a gap in the required continuum of services.

[90] *See, e.g., Sherry v. New York State Education Department*, 479 F. Supp. 1328 (W.D.N.Y. 1979), 1979-80 EHLR 551:519.

[91] *Honig v. Doe*, 484 U.S. at 325-26, 108 S. Ct. at 605, 1987-88 EHLR at 559:240. For a more detailed discussion of the requirements when suspending a child, *see* the next section of this chapter.

[92] *See, e.g., Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729 (1975) (for suspensions of up to ten days the Constitution requires that some kind of notice be given and some kind of hearing be afforded).

[93] 20 U.S.C.A. §1415(e)(3) (1990).

[94] 484 U.S. 305, 108 S. Ct. 592 (1988), 1987-88 EHLR 559:231.

Honig involved two different students in somewhat similar circumstances. One, John Doe, was a seventeen-year-old emotionally disturbed youth whose IEP stated that he needed "[i]mprovement in [his] ability to relate to [his] peers [and to] cope with frustrating situations without resorting to aggressive acts."[95] Unfortunately, Doe's physical abnormalities, speech difficulties and poor grooming habits often made him the target of teasing and ridicule by his classmates. In one instance he responded to such taunts by choking a fellow student, and he continued his violent activity by kicking out a school window while being escorted to the principal's office after the assault. Doe admitted his misconduct and was suspended for five days. Subsequently the school district extended his suspension and the principal recommended that Doe be expelled. Litigation followed, and Doe returned to school after a 39-day suspension. During the 39 days, Doe received no educational services.

The second plaintiff in *Honig v. Doe*, Jack Smith, was an emotionally disturbed student who was unable to control his verbal or physical outbursts. He had a history of disruptive behavior, including stealing, extorting money from fellow students, and making sexual comments to female classmates. When, after a prior warning, Smith made further lewd comments, he was suspended for five days. As with Doe, the school district subsequently extended Smith's suspension indefinitely. Smith's family was given an option of selecting a half-day program or home tutoring for their son, and they chose the latter. Upon learning of Doe's lawsuit, Smith sought and obtained leave to intervene in that action.

The Supreme Court in *Honig* found the language of the EAHCA to be "unequivocal."[96] The Court stated: "We think it clear . . . that Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school."[97] Thus, the Supreme Court held that unilateral expulsion of handicapped children is no longer permitted, for it constitutes a change in placement that cannot be instituted without compliance with the EAHCA procedural requirements.[98] Further, the Court held that a suspension in excess of ten days also constitutes such a change of placement, thus triggering the stay-put provision. In sum, therefore, under the Court's ruling the local education agency may temporarily suspend a handicapped student for no more than ten school days without such a temporary suspension being considered a change in placement.

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[95] 484 U.S. at 312-13, 108 S. Ct. at 598, 1987-88 EHLR at 559:234.

[96] 484 U.S. at 323, 108 S. Ct. at 604, 1987-88 EHLR at 559:239 referring to the stay-put provision.

[97] *Id.*

[98] This holding is consistent with the previous lower court decisions in *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981), 1980-81 EHLR 552:267, *cert. denied*, 454 U.S. 1030 (1981), (expulsion constitutes a change in placement, which invokes the procedural protections of the EAHCA); *Kaelin v. Grubbs*, 682 F.2d 595 (6th Cir. 1982), 1982-83 EHLR 554:115 (same); *Lamont X v. Quisenberry*, 606 F. Supp. 809 (S.D. Ohio 1984), 1984-85 EHLR 556:437 (removal from classroom and provision of home tutoring

In ruling as it did in *Honig*, the Supreme Court did not accept the school district's request that the Court read a "dangerousness" exception into the EAHCA. The educators were concerned that a literal reading of the stay-put provision would result in the "return [of] violent or dangerous students to school while the often lengthy [administrative] proceedings run their course."[99] The Court disagreed, but it did not leave school districts defenseless to respond to children who presented a danger to themselves or others. Noting that critical situations could arise in which a parent would not agree with the school district so as to permit a change in placement considered essential by the district,[100] the Supreme Court made it clear that a district may seek court involvement. The Court stated:

> [I]n those cases in which the parents of a truly dangerous child adamantly refuse to permit any change in placement, the 10-day respite gives school officials an opportunity to invoke the aid of the courts under Section 1415(e)(2), which empowers courts to grant any appropriate relief.[101]

Thus, in *Honig* the Supreme Court indicated that not only do *parents* have the ability to proceed directly to court in certain circumstances without first exhausting administrative remedies, but *school districts* also have this opportunity, in limited circumstances. The Court noted that it had previously stated in *Smith v. Robinson*[102] that exhaustion of administrative procedures is not required when such exhaustion would be futile or inadequate. Thus, the Court stated that while the school district has the burden of proving that it would be futile or inadequate to exhaust administrative procedures, once the district meets that burden it does not have to exhaust administrative remedies prior to seeking court relief to allow long-term denial of access to school to an allegedly dangerous handicapped child.[103]

Although the Supreme Court does require the school district to first convince the court that it would be futile or inadequate to seek administrative review, this presumably is not a difficult threshold issue. This requirement will be inextricably

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constitutes a change in placement, which invokes the procedural protections of the EAHCA); *Doe v. Koger*, 480 F. Supp. 225 (N.D. Ind. 1979), 1979-80 EHLR 551:515 (handicapped child cannot be expelled for disruption due to child's handicap); *Stuart v. Nappi*, 443 F. Supp. 1235 (D. Conn. 1978) (expulsion constitutes a change in placement, which invokes the procedural protection of the EAHCA).

[99] 484 U.S. at 323, 108 S. Ct. at 604, 1987-88 EHLR at 559:239.

[100] *Honig* does not limit the ability of the school district and the parents to "otherwise agree" to a placement, either in the interim until a new IEP is agreed upon or otherwise finally determined (20 U.S.C.A. §1415(e)(3) (1990)), or as the substance of a new IEP. The district was concerned with, and the Court addressed, the possibility that the district and parents would not "otherwise agree," thus triggering imposition of the stay-put proviso.

[101] 484 U.S. at 326, 108 S. Ct. at 605, 1987-88 EHLR at 559:240.

[102] 468 [illegible].S. 992, 1014, n.17, 104 S. Ct. 3457, 3469, n.17 (1984), 1983-84 EHLR 555:493, 503, n.17.

[103] 484 U.S. at 327, 108 S. Ct. at 606, 1987-88 EHLR at 559:241.

intertwined and subsumed by the issue of whether the child before the court is dangerous to himself or others. If the child is in fact dangerous, the administrative process is by definition futile or inadequate. Thus, although the Supreme Court stated that there is no dangerousness exception to the EAHCA, in reality the Court has recognized such an exception. The major effect of the Court's ruling is that the determiner of dangerousness will not be a hearing officer, but rather a court.[104]

There is another consequence of the *Honig* decision. If the dangerousness exception had been read into the statute so as to require a hearing officer to make a determination of whether the child was in fact dangerous, parents of the disabled child would probably have to petition for such a hearing—since that is the procedure available to parents under the EAHCA to forestall the LEA from effectuating a change of placement. In that event, the parents, as petitioners, would presumably have the burden of proving that the child is not dangerous. As a result of the Court's ruling in *Honig*, however, the school district will bear the burden of proving that the child is dangerous.

Almost as important as what the Supreme Court said in *Honig* is what the Court did not say. The *Honig* decision leaves a number of questions unresolved.

The first open issue involves what is known as the "nexus inquiry." Prior to the *Honig* decision, several courts had held that before a handicapped student can be given a long-term suspension from school, an inquiry has to be pursued to determine whether there is a causal relationship between the action complained of and the child's handicap.[105] The purpose of the nexus inquiry is to determine whether there is a connection (or nexus) between the handicapping condition and the complained-of behavior. The underlying philosophy is that a child should not be denied educational services because of actions that can be expected to result from the child's handicapping condition. Such was the case in *Honig v. Doe*, where it was anticipated that both emotionally disturbed children would exhibit the inappropriate behavior that in fact occurred. Although not explicitly stated by the Supreme Court in *Honig*, there was apparently a nexus between the inappropriate actions of the two students and their handicapping conditions.[106] Thus, it is unclear whether *Honig* precludes *any* handicapped child from being unilaterally suspended for more than ten days, or, more narrowly, only any handicapped child whose behavior satisfies the nexus standard.[107] The latter approach makes practical sense since it would protect only those children who, in effect, cannot control their improper behavior. Also, if it becomes clear that *no* handicapped children can receive long-term suspensions, such children may feel that they are immune from substantial disciplinary action. On the other hand, a nexus requirement could provide an ill-intentioned school district with an escape hatch through which it could effectively negate the protections of *Honig*.

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[104] *See, e.g., Board of Education of Township High School District No. 211 v. Corral*, 15 EHLR 441:390 (N.D. Ill. 1989) (LEA granted injunctive relief barring return of dangerous handicapped child upon court finding that standards for injunctive relief were satisfied: (1) LEA was likely to succeed on the merits; (2) LEA would be irreperably harmed; (3) injury to LEA outweighed injury to student; and (4) injunction was in the public interest).

[105] *See, e.g., S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981), 1980-81 EHLR 552:267, *cert. denied*, 454 U.S. 1030 (1981) (only the multidisciplinary team can change placement); *Doe v. Koger*, 480 F. Supp. 225 (N.D. Ind. 1979), 1979-80 EHLR 551:515 (same); *Adams Central School District v. Deist*, 1983-84 EHLR 555:124 (Sup. Ct. Neb. 1983) (educational authorities have the burden of producing evidence as to whether the student's expulsion would be for behavior due to his handicap).

[106] For most emotionally disturbed youngsters, it is unlikely that behavioral problems will be unrelated to the handicapping condition.

Assuming that a nexus inquiry is required before suspending a handicapped child for more than ten days, other questions then arise. For instance, who is to conduct this inquiry? Presumably, it would be conducted by the same body that determines the child's IEP.[108] Next, what is to be the applicable standard of review with respect to that inquiry and what evidentiary standard must be established to satisfy the burden of proof with respect to the causal connection? The standard of review appears to be "whether the [handicapped] student's misconduct bears a relationship to his handicapping condition,"[109] or whether the handicapping condition is causally related to this behavior.[110] At least one court has held that the applicable standard of proof is a preponderance of the evidence.[111]

A second open issue involves the ability of school districts to suspend or expel children who are not diagnosed as being handicapped until after they have engaged in behavior requiring discipline. Although the *Honig* decision is silent concerning the discipline of a child who has not yet been identified as handicapped, at least one court has held that the full EAHCA due process rights come into play once the school district is on notice that the child is suspected of being handicapped.[112]

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[107] In a related matter, the DOE has opined that educational services may not be discontinued during the period of a proper long-term suspension of a handicapped child, even if the underlying misbehavior is unrelated to the child's handicap. OSEP Policy Letter, 16 EHLR 735 (1990). The DOE discounted language to the contrary by the Ninth Circuit (*Doe v. Maher*, 793 F.2d at 1482 (9th Cir. 1986), 1985-86 EHLR at 557:360, *aff'd on other grounds*, *Honig v. Doe*, 484 U.S. 305, 108 S. Ct. 592 (1988), 1987-88 EHLR 559:231) by concluding that such language constituted dicta rather than a ruling of the circuit court. *Id.*

Termination of educational services to a suspended child who is handicapped within the meaning of Section 504 *is* permissible when the underlying misconduct is not related to the child's disability. When a child is handicapped under both the EAHCA and Section 504, however, the more stringent requirements under the EAHCA apply. *See, e.g.*, OSEP Policy Letter, 13 EHLR 213:258 (1989).

[108] Logically, the very same change of placement procedures that are pursued to change an IEP would be pursued in this situation. *See, e.g.*, *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981), 1980-81 EHLR 552:267, *cert. denied*, 454 U.S. 1030 (the multidisciplinary team is the body authorized to change an IEP); *Doe v. Koger*, 480 F. Supp. 225 (N.D. Ind. 1979), 1979-80 EHLR 551:515 (same).

[109] *S-1 v. Turlington*, 635 F.2d at 350, 1980-81 EHLR at 552:272.

[110] *See, e.g.*, *School Board of the County of Prince William, Va. v. Malone*, 762 F.2d 1210 (4th Cir.1985), 1984-85 EHLR 556:406; *Doe v. Koger*, 480 F. Supp. 225 (N.D. Ind. 1979), 1979-80 EHLR 551:515.

[111] *School Board of the County of Prince William, Va. v. Malone*, 762 F.2d 1210 (4th Cir. 1985), 1984-85 EHLR 556:406.

A third open issue involves changes in program as opposed to changes in placement. For the protections established by *Honig* and the stay-put provision to become operative, there must be an intent or effort to effect a change in placement. Thus, minor changes in *program* only do not give rise to due process concerns and the stay-put provision.[113] In other words, if there is not a change in placement, the only limitation set upon a school district is that it treat a handicapped child in the same way as it would treat a non-handicapped child.[114]

The Court recognized in *Honig* that normal in-school disciplinary procedures are available to school districts seeking to discipline handicapped students. The Court stated that "[s]uch procedures may include the use of study carrels, time-outs, detention, or the restriction of privileges."[115] There is also considerable case law, decided before *Honig*, upholding alternative disciplinary actions.[116] Ideally, issues involving in-school techniques to address behavior should be part of the IEP process, incorporated into the child's IEP. In any event, it is likely that courts will refrain from intervention when in-school discipline is at issue, unless the school's actions rise to the level of a constitutional violation.

The final area unaddressed by *Honig* (because the plaintiffs in *Honig* were in fact identified and classified under the EAHCA) concerns the question of what discipline is permissible for those children who are not classified as handicapped under the EAHCA, but who are so classified under Section 504 of the Rehabilitation Act.[117] This includes children with emotional problems, those who suffer from alcoholism, or students with other disabilities who are not necessarily educationally handicapped. In such a situation, the school district has a responsibility to provide reasonable accommodations,[118] but several specific questions remain unanswered:

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[112] *Doe v. Rockingham County School Board*, 658 F. Supp. 403 (W.D. Va. 1987), 1986-1987 EHLR 558:319 (where the LEA was in the process of testing a student to determine if the child was handicapped, it was required to follow the same procedures regarding discipline as though the child were already classified as handicapped).

[113] *See* section VI of this chapter, *supra*.

[114] Section 504 of the Rehabilitation Act of 1973 (29 U.S.C.A. §794 (West Supp. 1990)) would prohibit discrimination against the handicapped child. *See* chapter 6 of this text, *supra*.

[115] 484 U.S. at 325, 108 S. Ct. at 605, 1987-88 EHLR at 559:240. *See also*, Comment following 34 C.F.R. §300.513 which provides: "While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others."

[116] *See, e.g., Hayes v. Unified School District No. 377*, 669 F. Supp. 1519 (D. Kan. 1987), 1987-88 EHLR 559:249 (time-outs), *aff'd*, 877 F.2d 809 (10th Cir. 1989), 15 EHLR 441:526; *Dickens v. Johnson County Board of Education*, 661 F. Supp. 155 (E.D. Tenn. 1987) (time-outs); *Garland Independent School District v. Wilkes*, 657 F. Supp. 1163 (N.D. Tex. 1987), 1986-87 EHLR 558:308 (restraints); *Cole v. Greenfield-Central Community Schools*, 657 F. Supp. 56 (S.D. Ind. 1986), 1986-87 EHLR 558:467 (paddling, isolation, mouth taping); *Behavior Research Institute, Inc. v. Leonard*, 1985-86 EHLR 557:402 (Mass. P. and Fam. Ct. 1986) (physically aversive techniques.)

First, if the school district unilaterally seeks to suspend such a child for more than ten days, would *Honig* require the school district to classify the child as handicapped under Section 504? Second, would *Honig* require a nexus inquiry? Third, would *Honig* prohibit a suspension of more than ten days if there were in fact a relationship between the handicap and the inappropriate behavior? Would a failure to so proceed violate Section 504 as constituting discrimination on the basis of handicap (treating children with other handicaps differently from children with educational handicaps)? At the present time there is scant, if any, guidance from the courts to assist educational agencies in this regard.[119]

VIII. Impartiality of Hearing Officers

The Supreme Court has indicated that considerable reliance should be placed upon the procedures set forth in the EAHCA to help ensure that handicapped children are provided with appropriate educational placements.[120] When a due process hearing is conducted pursuant to the EAHCA, the hearing officer must be impartial in order to preserve the integrity of the process. Accordingly, a hearing officer, whether at the local or state level, may not be "an employee of such agency or unit involved in the education or care of the child."[121] Further, no "person having a personal or professional interest which would conflict with his or her objectivity in the hearing" may serve as a hearing officer.[122]

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[117] 29 U.S.C.A. §794 (West Supp. 1990).

[118] *See* chapter 6 of this text, *supra*.

[119] *But see*, Long-Term Suspension or Expulsion of Handicapped Students (OCR Policy Memorandum, Oct. 28, 1988) and Suspension of Handicapped Students—Deciding Whether Misbehavior Is Caused By a Child's Handicapping Condition (OCR Policy Memorandum, Nov. 13, 1989), in which the U.S. Department of Education, Office for Civil Rights, concludes that the same protections applicable to students classified as handicapped under the EAHCA are available to handicapped students pursuant to Section 504 (except for students handicapped solely by virtue of being alcoholics or drug addicts who are disciplined for rules as to the use and possession of drugs or alcohol).

[120] *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982), 1981-82 EHLR 553:656.

[121] 20 U.S.C.A. §1415(b)(2) (1990).

[122] 34 C.F.R. §300.507(a)(2) (1988).

These restrictions have been interpreted as precluding employees of the SEA from serving as hearing officers.[123] This prohibition is not limited to those states in which the due process hearing is provided in a one-tier, state-level hearing; it is also applicable to those in which there is a two-tier system and the SEA's involvement is as a reviewer of the local hearing officer's decision.[124] Further, it is not necessary that the SEA employee be directly involved in the education of the child in order to be disqualified.[125]

The courts are divided concerning the question of whether a superintendent or commissioner of an SEA may serve as a hearing officer (either in a one-tier system or upon review in a two-tier system).[126] Indeed, the courts disagree as to the definition of an SEA employee. Courts have, in fact, reached conflicting conclusions with respect to the questions of whether the superintendent/commissioner of the SEA is or is not an employee of the SEA,[127] or whether a member of a state board of education is or is not an employee of the SEA.[128]

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[123] *See, e.g., Grymes v. Madden*, 672 F.2d 321 (3d Cir. 1982), 1981-82 EHLR 553:546 (employee of SEA); *Colin K. v. Schmidt*, 715 F.2d 1 (1st Cir. 1983), 1983-84 EHLR 555:225 (employee of SEA involved in administrative appeal); *Vogel v. School Board of Montrose*, 491 F. Supp. 989 (W.D. Mo. 1980), 1980-81 EHLR 552:202 (State Deputy Commissioner of SEA). *See also, East Brunswick Board of Education v. New Jersey State Board of Education*, 1982-83 EHLR 554:122 (D.N.J. 1982) (Chief Classification Officer, SEA).

[124] S. Conf. Rep. No. 455, 94th Cong. 1st Sess., reprinted in 1975 *U.S. Code Cong. and Admin. News* 1425; *Grymes v. Madden*, 672 F.2d 321 (3d Cir. 1982), 1981-82 EHLR 553:546; *Helms v. McDaniel*, 657 F.2d 800 (5th Cir. 1981), 1981-82 EHLR 553:205; *Colin K. v. Schmidt*, 715 F.2d 1 (1st Cir. 1983), 1983-84 EHLR 555:225.

Further support for this application can be found in 34 C.F.R. §300.510 (1988), which authorizes conversion of a state-level review into a hearing for the purpose of receiving additional evidence.

[125] *See, e.g., Robert M. v. Benton*, 634 F.2d 1139 (8th Cir. 1980), 1980-81 EHLR 552:262 (superintendent of SEA, as an employee of the SEA, is indirectly involved in the education of a handicapped child and, as such, is disqualified to serve as hearing officer).

[126] Compare (1) cases permitting the superintendent/commissioner of the SEA to serve: *Victoria L. v. District School Board*, 741 F.2d 369 (11th Cir. 1984), 1984-85 EHLR 556:200; *Brandon E. v. Wisconsin Department of Public Instruction*, 595 F. Supp. 740 (E.D. Wis. 1984), 1984-85 EHLR 556:248; *Timms v. Metropolitan School District of Wabash County, Inc.*, 1982-83 EHLR 554:361 (S.D. Ind. 1982), with (2) cases not permitting the superintendent/commissioner of the SEA to serve: *Muth v. Central Bucks School District*, 839 F.2d 113 (3d Cir. 1988), 1987-88 EHLR 559:295, *rev'd on other grounds, Dellmuth v. Muth*, 491 U.S. ___, 109 S. Ct. 2397 (1989), 15 EHLR 441:443; *Robert M. v. Benton*, 634 F.2d 1139 (8th Cir. 1980), 1980-81 EHLR 552:262. *See also, Holmes v. Sobol*, 690 F. Supp. 194 (W.D.N.Y. 1988) (since the SEA funds educational programs in part, the SEA commissioner has a fiscal conflict of interest); Revised DAS Bulletin No. 107, EHLR 203:19 (1984) (chief state school officers are presumed to be involved in the education and care of handicapped children and thus precluded from serving).

[127] Compare *Victoria L. v. District School Board*, 741 F.2d 369 (11th Cir. 1984), 1984-85 EHLR 556:200 (not an employee); *Brandon E. v. Wisconsin Department of Public Instruction*, 595 F. Supp. 740 (E.D. Wis. 1984), 1984-85 EHLR 556:248 (not an employee); with *Muth v. Central Bucks School District*, 839 F.2d 113 (3d Cir. 1988), 1987-88 EHLR 559:295, *rev'd on other grounds, Dellmuth v. Muth*, 491 U.S. ______, 109 S. Ct. 2397 (1989), 15 EHLR 441:443 (is an employee) and *Robert M. v. Benton*, 634 F.2d 1139 (8th Cir. 1980), 1980-81 EHLR 552:262 (is an employee).

There is some precedent to support the prohibition of an employee of one school district from serving as a hearing officer for another school district. In *Mayson v. Teague*[129] the Eleventh Circuit recognized a conflict of interest in such a situation. The court felt that LEA employees "follow policies arrived at collectively by employees on both state and local levels."[130] Accordingly, an employee of any LEA is involved in the education of the child at issue.[131] Further, the *Mayson* court concluded that an employee of another LEA had a personal or professional interest which would conflict with his or her objectivity in the hearing.[132] At least one other court has followed the reasoning and holding in *Mayson*.[133]

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[128] Compare *Stark v. Walter*, 1984-85 EHLR 556:203 (S.D. Ohio 1984) (disqualification of member of state board of education because he was considered an employee of the SEA), with *Vermont Association for Learning Disabilities v. Kaagan*, 1982-83 EHLR 554:349 (D. Vt. 1982) (a state board of education member is not an employee of the SEA).

[129] 749 F.2d 652 (11th Cir. 1984), 1984-85 EHLR 556:316.

[130] 749 F.2d at 658, 1984-85 EHLR at 556:320.

[131] *Id.*

[132] 749 F.2d 652 (11th Cir. 1984), 1984-85 EHLR 556:316. *See also*, 34 C.F.R. §300.507(a)(2) (1988), which uses the same language.

[133] *Matlock v. McElrath*, 1985-86 EHLR 557:383 (M.D. Tenn. 1986) (system of assigning hearing officers cannot include use of employee of another LEA).

15

Education for All Handicapped Children Act: More on Procedure

I. Introduction

In addition to the procedural issues addressed in chapter 14, there are others that are unique to the EAHCA. These include issues relating to private schooling, surrogate parenting, testing and evaluation, and third-party funding.

The section on private schooling for handicapped children, with which this chapter begins, concerns the rights and responsibilities applicable to parents of handicapped children who have exercised their prerogative to enroll their children in private school. Such instances do *not* include situations involving placement of students through the IEP process in schools specifically approved for the education of handicapped children. Rather, this section analyzes an LEA's responsibility to provide services in support of the non-special education received by a handicapped child who is enrolled in a regular (non-handicapped) private school. The nuances pertaining to the constitutional requirement of separation of church and state are also discussed with respect to those children enrolled in sectarian (parochial) schools.

The second issue addressed in this chapter involves the questions of (1) who may serve as a surrogate parent and thereby assume the parents' role and act on behalf of a handicapped child when the child's parent or guardian is not available, and (2) what responsibilities are owed by a person acting as a surrogate parent of a handicapped child? This section also analyzes the rights under the EAHCA that specifically inure to parents, as distinct from the rights that parents may assert on behalf of their children.

The next section of this chapter addresses the testing and evaluation of handicapped children and children suspected of being handicapped. This section includes a discussion of the procedures that must be pursued to conduct proper tests and evaluations, both with respect to an initial (first-time) evaluation and to later re-evaluations. The particularized procedures necessary to evaluate a child for specific learning disabilities are also described.

The following section focuses on situations in which parents wish to obtain an independent educational evaluation—one conducted by a professional who is not employed by the LEA. This analysis includes a discussion of the circumstances in which parents may hold the LEA financially responsible for such independent evaluations and the procedural steps required to be taken both by parents and LEAs when such evaluations are conducted.

The last section of this chapter addresses the availability of funds from third parties—private insurance companies and Medicaid—to pay for educational services for disabled children.This analysis is primarily concerned with determining what circumstances must exist to allow accessing third-party payments for related services.

II. Private Schooling for Handicapped Children

Handicapped children who attend private schools that have programs that are not designed specifically for special education may still be entitled to receive special education or related services, or both, from their LEA.[1] The EAHCA requires a state's plan to set forth policies and procedures assuring that

> to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services. . . .[2]

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[1] This section of the text does not address instances in which the LEA, through an IEP, places a handicapped child at a private school that has been approved by the state to service handicapped children. Such instances are governed by the IEP process and the LEA's mandated efforts to provide a FAPE to the child. In such situations, all of the procedural and substantive concerns for providing a FAPE come into play. For a more detailed discussion of these issues, *see* chapters 13 and 14 of this text, *supra*, and 16, *infra*.

This section also does not address those situations in which parents unilaterally place their child in a program for handicapped children because the parents disagree with the IEP recommended by the LEA. In such situations, if the program chosen by the parents meets state educational standards, the parents may be entitled to reimbursement for the cost of the placement if the parents ultimately prevail after pursuing their administrative remedies. For a more detailed discussion of the reimbursement issue, *see* chapter 17 of this text, *infra*.

[2] 20 U.S.C.A. §1413(a)(4)(A) (1990).

LEAs—as well as intermediate educational units (IEUs)— are required to assure that their school district policies and programs will be administered in the manner required by the state's plan.[3]

A. Handicapped Children in Non-Sectarian Schools

An LEA must be prepared to provide a FAPE to any handicapped child residing within its jurisdiction.[4] Parents of handicapped children, however, are not required to avail themselves of a proferred placement. They may instead choose to place their child in a private school, even one that does not adhere to state standards for the education of handicapped children.[5] Handicapped children in such placements are identified as "private school handicapped children."[6]

SEAs[7] and LEAs[8] each have responsibility to ensure that such private school handicapped children receive appropriate special education and related services. The LEA responsible for providing such services is the one in which the child resides. The applicable regulation provides that "[e]ach local education agency shall provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency."[9] This does not mean that the LEA must pay for the educational cost of the private placement, however. On the contrary, the regulations provide that

> the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under Regs. 300.450-300.460.[10]

There is a dearth of case law interpreting the scope of this apparently extensive obligation imposed upon school districts. The United States Department of Education (DOE), however, has interpreted this provision narrowly. The DOE contends that private school handicapped children do not have a right to a FAPE.[11]

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[3] 20 U.S.C.A. §1414(a)(6) (1990).

[4] OSEP Policy Letter, EHLR 211:388 (1986); DAS Policy Letter, EHLR 211:263 (1981).

[5] OSEP Policy Letter, EHLR 213:268 (1989).

[6] 34 C.F.R. §300.450 (1988).

[7] 34 C.F.R. §300.451 (1988).

[8] 34 C.F.R. §300.452 (1988).

[9] 34 C.F.R. §300.452 (1988).

[10] 34 C.F.R. §300.403 (1988). Although §300.403 references §§300.450-300.460, the regulations actually promulgated to date encompass only §§300.450-300.452 (1988).

[11] OSEP Policy Letter, EHLR 211:414 (1986).

Under the DOE's restricted view, SEAs and LEAs must provide students enrolled in private schools only with a "genuine opportunity for equitable participation" in programs assisted or carried out under Part B of the EAHCA.[12] In reaching this conclusion, the DOE relied upon regulations addressing the participation of students enrolled in private schools in federally funded programs administered by a state or sub-grantee of a state.[13] In particular, the DOE relied on the regulatory requirement that a public agency must ensure that such children receive comparable benefits:

> The program benefits that a sub-grantee provides for students enrolled in private schools must be comparable in quality, scope and opportunity for participation to the program benefits that the sub-grantee provides for students enrolled in public schools.[14]

The DOE does require an LEA to use a portion of its federal funds to provide special education and related services to private school handicapped children. The DOE has stated:[15]

> Whether a particular private school child will receive services . . . depend[s] upon a number of factors, including the amount of funds available [to the LEA for these purposes], and the relative needs of the public and private school children residing in the LEA's jurisdiction.[16]

Although the DOE's interpretation of 34 C.F.R. §300.452 appears to be more restrictive than the broad language of that regulation, the DOE's interpretation of its own regulation will presumably be given considerable weight by any court confronted with determining the extent of an LEA's responsibility to private school handicapped children.[17]

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[12] OSEP Policy Letter, EHLR 213:268 (1989); OSEP Policy Letter, EHLR 213:125 (1988). Part B of the EAHCA, in providing for assistance for education of all handicapped children, sets forth the substantive requirements for a FAPE and the procedural safeguards applicable to handicapped children. For a more detailed discussion of Part B, *see* chapter 13 of this text, *supra*.

[13] *See* 34 C.F.R. §§76.650-76.662 (1989). These regulations impose responsibility upon states and sub-grantees administering federally funded programs to provide students enrolled in private schools with a genuine opportunity for equitable participation. This includes an obligation to consider the needs of such students and the number of such students and to spend the same average amount of program funds on students enrolled in private schools that are spent on students enrolled in public schools. Adherence to these regulations governing parentally placed private school students is required by 34 C.F.R. §300.451 (1988).

[14] 34 C.F.R. §76.654 (1989).

[15] *See, e.g.*, OSEP Policy Letter, EHLR 213:268(1989); OSEP Policy Letter, EHLR 211:414 (1986).

[16] OSEP Policy Letter, EHLR 211:414 (1986).

[17] In some circumstances the courts may hold that a public agency has exceeded its authority when promulgating regulations.(*See, e.g.*, *Commonwealth v. Heckler*, 701 F.2d 223 (1st Cir. 1983), which is discussed later in this chapter.) It is unlikely that in this instance DOE will be considered to have

Neither the EAHCA nor its regulations explicitly state the location at which services for a private school handicapped child must be provided. The DOE has indicated, however, that such services "can be provided on the premises of the nonpublic school"[18] or at a public school site.[19] It is unclear how the "least restrictive environment" mandate may impact on this decision.[20] The DOE has said that "it would appear that the 'least restrictive environment' provision would require that the services be provided to the nonpublic school child in his or her environment, if possible."[21]

In the event that services pursuant to the Act are provided at a location other than the private school site, presumably transportation to and from the location of such services would be required as a related service.[22] Further, to the extent that services can be provided off the private school site, they may be provided either within the jurisdiction of the LEA in which the child resides or within the boundaries of the LEA in which the private school is located.[23]

B. Handicapped Children in Sectarian Schools

The constitutional prohibition against the establishment of religion raises an additional issue when a handicapped child attends a sectarian school.[24] This

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exceeded its authority, however, due to the language of 20 U.S.C. §1413(a)(4)(A), which requires "participation" in EAHCA programs by handicapped children in private schools, but does not explicitly guarantee a FAPE to private school handicapped children.

It is important to note, however, that if the EAHCA regulations are interpreted to mandate less than a full FAPE for private school handicapped children, such children may have a viable Section 504 claim against the LEA. For a more extensive discussion of Section 504 in the educational context, *see* chapter 6 of this text, *supra*.

[18] BEH Policy Letter, EHLR 211:110, 111 (1979).

[19] OSEP Policy Letter, EHLR 213:125 (1988) (LEA may provide services at a public school site, but must then provide student with transportation).

[20] For a more detailed discussion of LRE and its interrelationship with appropriateness, *see* chapter 16 of this text, *infra*.

[21] BEH Policy Letter, EHLR 211:110, 111 (1979).

[22] OSEP Policy Letter, EHLR 213:268 (1989). In situations in which services that are required to be made available under the Act are already provided by the private school, however, transportation may not be available as a related service. *See e.g.*, *McNair v. Oak Hills Local School District* 872 F.2d 153 (6th Cir. 1989), 15 EHLR 441:381 (a hearing-impaired child unilaterally placed in a school for the deaf where she received all her needed services was not entitled to transportation as a related service since the transportation to and from school was not designed to meet her unique needs but rather was for the purpose of travelling to the private school).

[23] OSEP Policy Letter, EHLR 211:414 (1986).

[24] The First Amendment to the U.S. Constitution provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

prohibition, commonly referred to as the establishment clause, frames the principle of separation between church and state.

In *Wolman v. Walter*[25] the Supreme Court held that providing state aid to pupils in church-related schools violated the principle of separation of church and state. The Court applied a three-pronged test to determine whether there was a violation of the establishment clause. Pursuant to that test, in order to comply with the Constitution, a statute (1) must have a secular legislative purpose, (2) must have a principal or primary effect that neither advances nor inhibits religion, and (3) must not foster excessive government entanglement with religion. In applying this test in *Wolman*, the Court concluded that providing for diagnostic services at a parochial school was permissible because such services involve little or no educational content and the professionals involved have limited contact with the children. The Court found that therapeutic and remedial services, on the contrary, do run afoul of the Constitution when they are provided on the premises of a religious school. The Court concluded that such therapeutic and remedial services would be permissible, however, if they were provided at a neutral site off the premises of the sectarian school.

In *Aguilar v. Felton*[26] the Supreme Court held that the provision of services (such as remedial programs) pursuant to Title I of the Elementary and Secondary Education Act of 1965[27] to disadvantaged students in parochial schools by employees of public schools violated the First Amendment. The Court concluded that there was excessive entanglement with religion because the services were provided in a pervasively sectarian environment, because they were provided by teachers (thereby necessitating ongoing inspection by supervisors to ensure the absence of a religious message during remediation), and because, by their nature, such services require frequent contacts between the regular (parochial) teachers and remedial (public) teachers to discuss the students involved.[28]

Although *Aguilar* involved Title I programs rather than EAHCA services, the distinction does not appear meaningful for First Amendment purposes. Nonetheless, the DOE has concluded that *Aguilar* does not apply to the EAHCA.[29] Despite the position taken by the DOE, however, at least one court has held *Aguilar* applicable to the EAHCA. *Zobrest v. Catalina Foothills School District*[30] concerned a hearing-impaired child attending a parochial school who sought the assistance of a sign-language interpreter. The court in *Zobrest* ruled that the LEA could not provide the interpreter in the parochial school because to do so would violate the First Amendment's requirement of separation of church and state. Following the analysis applied in *Wolman v. Walter*, the *Zobrest* court stated that "the role of a sign language interpreter is more analogous to a therapist than [to] a diagnostician,"[31] because the interpreter and therapist each have an ongoing relationship with the child, whereas a diagnostician's contacts are of a time-limited nature.

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[25] 433 U.S. 229, 97 S. Ct. 2593 (1977).

[26] 473 U.S. 402, 105 S. Ct. 3232 (1985).

[27] 20 U.S.C.A. §§2701-2976 (1990).

[28] *See also, School District of the City of Grand Rapids v. Ball*, 473 U.S. 373, 105 S. Ct. 3216 (1985) (programs providing classes at public expense to parochial students in classrooms located in and leased from the non-public schools violated the establishment clause of the First Amendment); *Pulido v. Cavazos*, 85-1096-CV-W8 (W.D. Mo. 1989) (in order to comply with the establishment clause of the First Amendment, mobile units used by LEAs to provide remedial instruction to parochial students must not be on any portion of parochial school property).

[29] *See* OSEP Policy Letter, EHLR 211:405 (1986) and EAHCA Policy Letter, EHLR 211:372 (1985), where the DOE has read *Aguilar* to only apply to Title 1 programs.

III. Persons in a Parental Role

Under the EAHCA scheme, parents and guardians of handicapped children play a central role. First, an LEA must encourage the participation of a child's parents or guardian when developing an IEP for a handicapped child.[32] Furthermore, extensive requirements are set forth in the Act "to assure that handicapped children *and their parents or guardians* are guaranteed procedural safeguards with respect to the provision of free appropriate public education. . . ."[33]

The regulations promulgated pursuant to the EAHCA define the term "parent" as

> a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with Reg. 300.514. The term does not include the State if the child is a ward of the State.[34]

The regulatory definition of a parent includes "persons acting in the place of a parent, such as a grandmother or stepparent with whom a child lives, as well as persons who are legally responsible for a child's welfare."[35] State law governs the determination of the circumstances under which a child is made a ward of the state.[36]

Foster parents are generally not considered parents within the meaning of the Act, unless they have been appointed as surrogate parents. At least one court, however, has held that persons designated as *permanent* foster parents are considered parents within the regulatory definition.[37]

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[30] 15 EHLR 441:564 (D.C. Ariz. 1989).

[31] 15 EHLR at 441:564.

[32] 20 U.S.C.A. §1401(19) (1990).

[33] 20 U.S.C.A. §1415(a) (1990) (emphasis added). *See also*, the discussion in chapter 13 of this text, *supra*.

[34] 34 C.F.R. §300.10 (1988).

[35] *See* comment following 34 C.F.R. §300.10 (1988).

[36] BEH Policy Letter, EHLR 211:117 (1979).

The selection of surrogate parents is governed by 34 C.F.R. §300.514. Pursuant to that regulation, a surrogate parent should be appointed when

> (1) No parent (as defined in Reg. 300.10) can be identified;
>
> (2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or
>
> (3) The child is a ward of the state under the laws of that State.[38]

The educational agency responsible for assigning an individual to act as surrogate parent must ensure that the individual: "(i) [h]as no interest that conflicts with the interest of the child he or she represents; and (ii) [h]as knowledge and skills, that insure adequate representation of the child."[39] Persons who are deemed to have a conflict of interest include employees of the public agency involved in the education or care of the child,[40] foster parents when a child is a ward of the State,[41] and employees of the facility in which a child resides when such a relationship creates a conflict of interest.[42]

Foster parents can properly serve as surrogate parents,[43] except when the child is a ward of the state.[44] The circumstances under which foster parents may properly be appointed as surrogate parents are governed by state law.[45]

A surrogate parent's responsibilities are to represent the handicapped child in all matters relating to: "(1) [t]he identification, evaluation and educational placement of the child, and (2) [t]he provision of a free appropriate public education to the child."[46] In summarizing a surrogate parent's responsibility to truly represent the interests of a handicapped child, one court has said:

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[37] *Criswell v. State Department of Education*, 1986-87 EHLR 558:156 (M.D. Tenn. 1986) (appointment of a surrogate parent was not appropriate because the persons designated as permanent foster parents were parents pursuant to 34 C.F.R. §300.10). *See also*, OSEP Policy Letter, 16 EHLR 738 (1990) (agreeing with *Criswell* that long-term foster parents who display a genuine interest for welfare of child are persons acting as parents).

[38] 34 C.F.R. §300.514(a) (1988).

[39] 34 C.F.R. §300.514(c)(2) (1988).

[40] 34 C.F.R. §300.514(d) (1988). A person who is paid by the public agency, however, is not an employee of such agency solely because of such compensation. 34 C.F.R. §300.514(d)(2) (1988).

[41] OSEP Policy Letter, EHLR 211:470 (1987).

[42] OSE Policy Letter, EHLR 211:243 (1980) (employees of a private, non-profit residential care facility cannot serve as surrogate parents if advocating for an educational program for a child could result in financial loss to the facility).

[43] *See e.g., Mattie T. v. Holladay*, 1979-80 EHLR 551:109 (N.D. Miss. 1979) (when a child is placed by the court into the legal custody of a public agency and the child is living with foster parents, the foster parents are to serve as surrogate parents).

[44] OSEP Policy Letter, EHLR 211:470 (1987).

[45] *Id.*

> Surrogate parents shall be competent to advocate for the child, have no interest which would conflict with that advocacy, not be an employee of the agency responsible for the residential care or education of the child, get to know the child personally, become familiar with the child's needs, be of the same race as the child, if possible, and vigorously represent the child at each stage of the . . . process.[47]

Natural or adoptive parents of children or the guardians of such children can become involved with the EAHCA process in either of two capacities—on behalf of their handicapped child or on their own behalf. When parents are acting on behalf of their child, their right to act can be terminated by the proper appointment of a surrogate parent,[48] or by court appointment of a party to act on behalf of the child.[49]

Even in those instances in which parents lack the authority to act on behalf of their handicapped child, however, the parents still retain certain limited rights.[50] A case on point is *John H. v. MacDonald*.[51] In that case, after a child-neglect petition was filed, the state and the parents entered into a consent agreement granting temporary custody of a handicapped child to the state. The child was placed into a residential facility, and an educational surrogate parent was appointed. The natural parents filed suit for various forms of relief, including reimbursement for the total costs of the residential placement. In seeking to define those rights that belonged uniquely to the parents—as distinct from the rights of the child—the court cited three sections of the EAHCA in which reference is made to parents' rights.[52] The court held that parents of handicapped children always have the right to receive notification of IEP meetings and to participate in such meetings,[53] and the right not to be charged for the cost of educating their handicapped child.[54] With respect to the latter right, the court remanded for a determination of whether the parents were entitled to reimbursement under the particular facts of this case. Moreover, with respect to the former rights—notification of and participation in meetings to develop an IEP—the court held that these rights continue even when the student reaches the age of majority and can make his or her own decisions.[55]

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[46] 34 C.F.R. §300.514(e) (1988).

[47] *Mattie T. v. Holladay*, 1979-80 EHLR 551:109, 112 (N.D. Miss. 1979).

[48] *See, e.g., John H. v. MacDonald*, 1986-87 EHLR 558:366 (D.N.H. 1987) (surrogate parents are appointed to protect the child's rights).

[49] *See, e.g., Susan R.M. v. Northeast Independent School District*, 818 F.2d 455 (5th Cir. 1987), 1986-87 EHLR 558:415, in which the Fifth Circuit held that a parent had no standing to sue on behalf of a handicapped child after the court appointment of a state agency as managing conservator for the handicapped child. The circuit court further indicated that the parent could move under the Federal Rules of Civil Procedure to be appointed the next friend of the child if the child's interests were not being adequately represented by the conservator, but the parent must obtain such appointment to have standing to speak to the child's interests.

[50] *See e.g., John H. v. MacDonald*, 1986-87 EHLR 558:366 (D.N.H. 1987) (a surrogate parent does not protect the parents' limited rights; thus, parents may maintain an action in their own name to enforce their rights under the EAHCA); *Tschanneral v. D.C. Board of Education*, 594 F. Supp. 407 (D.D.C. 1984), 1984-85 EHLR 556:245 (parents have certain limited rights under 20 U.S.C. §1415 and may sue to enforce those rights).

[51] 1986-87 EHLR 558:366 (D.N.H. 1987).

IV. Testing and Evaluation

A. Evaluation Procedures

Parents must be provided with written notice when an LEA proposes to initiate an evaluation of a child suspected of being handicapped.[56] The requisite notice must explain all of the available procedural safeguards, set forth the proposed action, describe why the agency proposes to take such action, and include any other relevant factors.[57] The notice must be understandable and must be provided in the native language or other mode of communication used by the parent unless it is not feasible to do so.[58]

An LEA must obtain parental consent before conducting a pre-placement evaluation.[59] For such consent to be valid, the EAHCA regulations require that

> (a) The parent [must have] been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;

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[52] *See* 20 U.S.C.A. §1400(c) (1990) (purpose of the Act is "to assure that the rights of handicapped children and their parents or guardians are protected. . ."); 20 U.S.C.A. §1401(16) (1990) (special education is defined as being education provided "at no cost to parents or guardians"); 20 U.S.C.A. §1415(a) (1990) (procedural safeguards are "to assure that handicapped children and their parents or guardians are guaranteed . . . [a] free appropriate public education. . .").

[53] Referring to 34 C.F.R. §300.345 (1988); 34 C.F.R. §300.344 (1988). Note that 34 C.F.R. §300.345(e) (1988) requires the LEA to "take whatever action is necessary to insure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English."

[54] Referring to 20 U.S.C.A. §1401(16) (1990).

[55] 1986-87 EHLR 558:366 (the fact that a student reached the age of majority and agreed to an IEP did not excuse the public agency from notifying and permitting participation by the child's parents and/or surrogate parents).

[56] 34 C.F.R. §300.504(a) (1988).

[57] 34 C.F.R. §300.505 (1988).

[58] 34 C.F.R. §300.505(b) (1988).

[59] 34 C.F.R. §300.504(b)(1) (1988).

> (b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) which will be released and to whom; and
>
> (c) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.[60]

If the LEA plans to administer a particular test, the parent must be fully informed about that test.[61] If the LEA has not determined what specific tests are to be administered, it must provide the parents with a description of the general kinds of tests that will most likely be used.[62]

In the event the parents refuse to provide the requisite consent, the procedures that must be followed differ depending upon whether the applicable state law *also* requires parental consent. In those states in which the state law requires parental consent before evaluation,[63] state procedures to override the parental refusal to consent must be followed. In those states in which there is no state legal requirement for parental consent, however, the due process procedures set forth in the EAHCA regulations govern the manner in which an LEA may obtain authorization to evaluate a child without parental consent.[64]

Parents are entitled to an opportunity to inspect and review all educational records with respect to the identification, evaluation and educational placement of their child.[65] An LEA must comply with a parental request to inspect and review records "without unnecessary delay and before any meeting regarding an individualized education program. . . ."[66] Test protocols are included among those records that a parent is entitled to inspect and review.[67]

Any testing and evaluation conducted pursuant to the EAHCA must be racially and culturally unbiased. To qualify for financial assistance under the Act, each state must establish

> procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory.[68]

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[60] 34 C.F.R. §300.500 (1988).

[61] BEH Policy Letter, EHLR 211:187 (1980).

[62] *Id.*

[63] 34 C.F.R. §300.504(c)(1) (1988). *See also*, comment following 34 C.F.R. §300.504 (1988).

[64] 34 C.F.R. §300.504(c)(2) (1988). *See also*, comment following 34 C.F.R. §300.504 (1988). For a discussion of the EAHCA due process procedures, *see* chapter 13 of this text.

[65] 34 C.F.R. §300.502 (1988); 34 C.F.R. §300.562 (1988).

[66] 34 C.F.R. §300.562 (1988).

[67] DAS Policy Letter, EHLR 211:181 (1979).

[68] 20 U.S.C.A. §1412(5)(C) (1990).

The regulations promulgated pursuant to the Act repeat this mandate and require each SEA to ensure compliance by every public agency.[69] Although the dictate to not discriminate is clear, its application has not always led to consistent results.[70]

Before an LEA may take action with respect to the initial placement of a handicapped child, it must make sure that a "full and individual evaluation of the child's educational needs" is conducted.[71] When parents unilaterally place their handicapped child in a program some distance away from the home school district, however, it is the parents' obligation to make the child available to the LEA for evaluation.[72] Although LEAs typically use their own personnel to perform evaluations, they are not required to do so and may instead rely on a private evaluation.[73]

There are specific procedures set forth in the regulations[74] that must be

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[69] 34 C.F.R. §300.530 (1988).

[70] *See, e.g., Larry P. v. Riles* 1983-84 EHLR 555:304 (9th Cir. 1984), *amended*, 793 F.2d 969 (9th Cir. 1986), 1985-86 EHLR 557:433, and *Parents in Action on Special Education (PASE) v. Hannon*, 506 F. Supp. 831 (N.D. Ill. 1980), 1980-81 EHLR 552:108. In *Larry P.*, because of a significant over-representation of black students in educable mentally retarded (EMR) classes, the district court enjoined utilization of any stanardized IQ tests to identify black EMR children. The district court found that the IQ tests were standardized on a white population. On appeal, the Ninth Circuit concluded that the defendants failed to meet their burden to show that the IQ tests were properly validated for placing black students with IQ scores of 70 or less in EMR classes.

A contrary result occurred in *PASE*. In that case, 62 percent of the general student population was black but 82 percent of the educable mentally handicapped (EMH) population was black. After a lengthy and detailed analysis of the questions contained in each of the IQ tests administered (Stanford-Binet, WISC and WISC-R), the district court concluded that those tests, when used with other criteria, did not discriminate against black students. The court concluded that the plaintiffs did not meet their burden of showing that the tests, or the evaluation procedure as a whole, were discriminatory.

[71] 34 C.F.R. §300.531 (1988).

[72] *See, e.g., Dubois v. Connecticut State Board of Education*, 727 F.2d 44 (2d Cir. 1984), 1983-84 EHLR 555:398 (before a school system becomes liable under the Act for a special education placement of a student, it is entitled to up-to-date evaluative data); *Lenhoff v. Farmington Public Schools*, 680 F. Supp. 921 (E.D. Mich. 1988), 1987-88 EHLR 559:401 (LEA was under no duty to leave the state to conduct an evaluation of a student unilaterally removed from the school district without the prior knowledge or acquiescence of the educational officials).

[73] *See, e.g., Carroll v. Capalbo*, 563 F. Supp. 1053 (D.R.I. 1983), 1982-83 EHLR 554:501 (IEP could be based on a non-public assessment); *Silvio v. Commonwealth of Pennsylvania*, 439 A.2d 893 (Cmwlth. Ct. of Pa. 1982), 1981-82 EHLR 553:577 (LEA can rely upon private school evaluations rather than conduct its own).

[74] *See* 34 C.F.R. §300:532 (1988). That section provides:

> State and local educational agencies shall ensure, at a minimum, that:
>
> (a) Tests and other evaluation materials:
>
> (1) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;
>
> (2) Have been validated for the specific purpose for which they are used; and

followed when conducting an evaluation.[75] The procedures are designed to ensure that a comprehensive and multiperspective evaluation is conducted.[76] There is one exception to this rule, however. Children who have a speech impairment as their primary handicap may not require a complete battery of assessments.[77] In such a situation, a qualified speech-language pathologist should conduct the initial evaluation and determine whether a referral should be made for a more extensive assessment.[78]

Assessment of a child must be performed in every area that may relate to the suspected disability.[79] The qualifications that must be possessed by the assessors are determined by state law.[80]

> (3) Are administered by trained personnel in conformance with the instructions provided by their producers;
>
> (b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient;
>
> (c) Tests are selected and administered so as best to ensure that when a test is administered to a child with impaired sensory, manual or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those skills are the factors which the test purports to measure);
>
> (d) No single procedure is used as the sole criterion for determining an appropriate educational program for a child; and
>
> (e) The evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability.
>
> (f) The child is assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

[75] A schoolwide hearing screening is not an "evaluation" under the EAHCA. OSE Policy Letter, EHLR 211:276 (1980).

[76] 34 C.F.R. §300.532(d),(e),(f) (1988). *See also, Bonadonna v. Cooperman*, 619 F. Supp. 401 (D.N.J. 1985), 1985-86 EHLR 557:178 (an evaluation of a hearing-impaired child violated the EAHCA because it was based almost solely upon observation without consideration of any scientific test results).

[77] *See* comment following 34 C.F.R. §300.532 (1988).

[78] *Id.*

[79] 34 C.F.R. §300.532(f) (1988). *See also, Doe v. Board of Education of Nashville-Davidson County*, 15 EHLR 441:106 (M.D. Tenn. 1988) (an LEA must pay for a medical evaluation where it is necessary to plan an IEP).

[80] OSEP Policy Letter, EHLR 213:229 (1989) (state standards govern personnel qualifications and roles when determining which personnel may conduct diagnostic evaluations).

When classifying or placing a handicapped child, an LEA must comply with prescribed procedures.[81] The LEA must rely on a variety of tests and/or evaluations, rather than on just a single one.[82] The placement decision must be made by a group of persons who have knowledge both of the child and about the significance of the data.[83]

B. Re-Evaluations

Each handicapped child must be fully re-evaluated at least every three years.[84] This triennial evaluation must conform with the evaluation procedures.[85] In most respects, therefore, triennial evaluations are performed in the same fashion as initial evaluations. There are some significant differences, however. For example, although the parents must be notified that a re-evaluation will be occurring, prior parental consent to conduct the re-evaluation is not required.[86] In addition, the notice that is provided for a regularly scheduled triennial evaluation need not list the specific tests to be administered—as must the notice concerning an initial evaluation (when such tests are known).[87] To provide a full re-evaluation for most students, a psychological assessment must be conducted.[88] To assess an emotionally disturbed child's social-emotional status, however, does not require re-administration of psychological *tests* if the student's status and educational needs are determined to be unchanged.[89]

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[81] 34 C.F.R. §300.533 (1988) provides:

> (a) In interpreting evaluation data and in making placement decisions, each public agency shall:
>
> (1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;
>
> (2) Insure that information obtained from all of these sources is documented and carefully considered;
>
> (3) Insure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
>
> (4) Insure that the placement decision is made in conformity with the least restrictive environment rules in Regs. 300.550-300.554.
>
> (b) If a determination is made that a child is handicapped and needs special education and related services, an individualized education program must be developed for the child. . . .

[82] 34 C.F.R. §300.533(a)(1) (1988). *See also, Bonadonna v. Cooperman*, 619 F. Supp. 401 (D.N.J. 1985), 1985-86 EHLR 557:178 (evaluation of a hearing-impaired child violated the EAHCA because (1) it was based almost solely upon observation and not upon any validated scientific test results designed to test aptitude rather than the handicap, and (2) no one on the evaluation team was an expert in the education of hearing-impaired children).

[83] *Id.*

[84] 34 C.F.R. §300.534 (1988).

[85] 34 C.F.R. §300.532 (1988).

[86] *See* comment 1 following 34 C.F.R. §300.504 (1988). *See also*, EAHCA Policy Letter, EHLR 211:272 (1981); *Carroll v. Capalbo*, 563 F. Supp. 1053 (D.R.I. 1983), 1982-83 EHLR 554:501 (re-evaluation does not require consent).

C. Additional Procedures for Evaluating Specific Learning Disabilities

When evaluating children suspected of having specific learning disabilities, the procedural requirements applicable to other types of handicapped children are not sufficient. Rather, additional procedures must be met. For example, the multidisciplinary evaluation team must include the child's regular teacher or, if the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age.[90] If the child is under school age, the multidisciplinary team must include an individual qualified by the SEA to teach a child of that age.[91] The evaluation team must also include one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist or remedial reading teacher.[92]

There are particular criteria that must be met for determining whether a child has a specific learning disability.[93] The EAHCA regulations provide:

> (a) A team may determine that a child has a specific learning disability if:
>
> (1) The child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in paragraph (a)(2) of this section, when provided with learning experiences appropriate for the child's age and ability levels; and

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[87] BEH Policy Letter, EHLR 211:187 (1980).

[88] OSEP Policy Letter, EHLR 211:415 (1986) (for mentally retarded, emotionally disturbed and learning disabled students, a re-evaluation includes having a psychological assessment).

[89] OSEP Policy Letter, EHLR 211:447 (1987) (assessments of social-emotional status, which are required to be done as part of re-evaluations for children with handicaps under 34 C.F.R. §300.532(f) (1988), need not include psychological *tests*). This Policy Letter also provides that SEA guidelines allowing psychological assessments by other than psychological tests are permissible under the EAHCA.

[90] 34 C.F.R. §300.540 (1988).

[91] *Id.*

[92] *Id.*

[93] 34 C.F.R. §300.541 (1988).

> (2) The team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas:
>
> (i) Oral expression;
> (ii) Listening comprehension;
> (iii) Written expression;
> (iv) Basic reading skill;
> (v) Reading comprehension;
> (vi) Mathematics calculation; or
> (vii) Mathematic reasoning.
>
> (b) The team may not identify a child as having a specific learning disability if the severe discrepancy between ability and achievement is primarily the result of . . . [another handicap or environmental, cultural or economic disadvantage].

In addition, in order to classify a child as learning disabled, at least one team member other than the child's regular teacher must observe the child's academic performance in the regular classroom setting or, in the case of a child of less than school age or a child who is not in school, a team member must observe the child in an environment appropriate for a child of that age.[94] Finally, there must be a written report prepared by the multidisciplinary evaluation team setting forth considerable detail relating to the child's learning disability.[95] That report must be certified by each team member or it must include a separate signed statement for any dissenting team member.

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[94] 34 C.F.R. §300.542 (1988).

[95] 34 C.F.R. §300.543 (1988) provides:

> (a) The team shall prepare a written report of the results of the evaluation.
>
> (b) The report must include a statement of:
> (1) Whether the child has a specific learning disability;
> (2) The basis for making the determination;
> (3) The relevant behavior noted during the observation of the child;
> (4) The relationship of that behavior to the child's academic functioning;
> (5) The educationally relevant medical findings, if any;
> (6) Whether there is a severe discrepancy between achievement and ability which is not correctable without special education and related services; and
> (7) The determination of the team concerning the effects of environmental, cultural, or economic disadvantage.
>
> (c) Each team member shall certify in writing whether the report reflects his or her conclusion. If it does not reflect his or her conclusion, the team member must submit a separate statement presenting his or her conclusions.

See also, OSEP Policy Letter, EHLR 211:359 (1985) (with respect to children suspected of having a specific learning disability, there must be one written report by the multidisciplinary team, certified by each member, or else a separate statement submitted by each dissenting member).

V. Independent Educational Evaluations

An independent educational evaluation (IEE) is an evaluation "conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question."[96] Parents of a handicapped child have the right to obtain an IEE of their child.[97] Upon request each LEA must provide information to parents explaining where an IEE may be obtained.[98] Whenever parents obtain an IEE, the public agency must consider that evaluation when making any decision regarding provision of a FAPE to the handicapped child. Moreover, the LEA need not conduct its own evaluation and may rely upon the IEE in fashioning an IEP.[99] In the event that there is a due process hearing, the IEE may be presented as evidence.[100]

The most significant practical issue involving IEEs concerns the question of who must bear the cost of obtaining the evaluation—the public agency or the parents. According to the EAHCA regulations,

> A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. However, the public agency may initiate a [due process] hearing . . . to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.[101]

Under this procedure, a school district can be required to pay for an IEE if, after receiving the IEE, it declines to initiate a hearing to show that the IEE is essentially duplicative of an already appropriate evaluation conducted by the LEA.[102] Although an LEA cannot be required to choose between paying for an IEE and initiating a hearing until after the LEA receives a copy of the IEE, a parent may initiate a hearing to compel an LEA to finance an IEE if the unavailability of advance funding would deny parents the right to a publicly funded IEE.[103] Parents are not required to notify the LEA before obtaining an IEE,[104] and the IEE may be conducted before the multidisciplinary team meets to develop the IEP.[105] Whenever a hearing officer requests an IEE, however, the cost of such an evaluation is at public expense.[106]

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[96] 34 C.F.R. §300.503(a)(3)(i) (1988).

[97] 34 C.F.R. §300.503(a)(1) (1988).

[98] 34 C.F.R. §300.503(a)(2) (1988).

[99] *See, e.g., Evans v. District No. 17 of Douglas County, Nebraska*, 841 F.2d. 824 (8th Cir. 1988), 1987-88 EHLR 559:381 (LEA may rely upon appropriate IEE as sufficient evaluation to formulate IEP).

[100] 34 C.F.R. §300.503(c) (1988).

[101] 34 C.F.R. §300.503(b) (1988).

[102] *See, e.g., Evans v. District No. 17 of Douglas County, Nebraska*, 841 F.2d 824 (8th Cir. 1988), 1987-88 EHLR 559:381 (LEA that neither initiated hearing nor paid for IEE after receiving IEE report must bear cost of IEE).

[103] OSEP Policy Letter, 16 EHLR 735 (1990).

An LEA may apply appropriate criteria when determining whether it will pay for an IEE. These criteria, however, must be the same as those utilized when the LEA initiates an evaluation.[107] The LEA may consider criteria concerning the location of the evaluation,[108] but locational criteria cannot be applied in such a fashion as to prevent parents from obtaining an appropriate evaluation.[109] An LEA may also impose criteria concerning the qualifications of an examiner to the extent that they are the same criteria the LEA uses when it initiates an evaluation—but such criteria must comply with state standards.[110] School districts may also impose cost-limiting criteria for IEEs.[111]

Some courts have held that parents are entitled to only one IEE, not to multiple evaluations.[112] This limit of one IEE at public expense is apparently intended to preclude multiple evaluations of a similar type. In other words, those courts have held that school districts are not responsible for paying for duplicative or corroborative evaluations.[113]

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[104] *See, e.g., Hudson v. Wilson*, 828 F.2d 1059 (4th Cir. 1987), 1987-88 EHLR 559:139 (parents entitled to obtain an evaluation and demand payment without giving prior notice to LEA).

[105] *See, e.g., Hiller v. Board of Education of the Brunswick Central School District*, 687 F. Supp. 735 (N.D.N.Y. 1988), 15 EHLR 441:194 (IEE may be performed before discussing IEP).

[106] 34 C.F.R. §300.503(d) (1988).

[107] 34 C.F.R. §300.503(e) (1988). *See also*, OSEP Policy Letter, 16 EHLR 735 (1990) (an independent evaluator must be permitted to observe a child in the classroom if the LEA evaluator observed the child in the classroom or if the LEA's assessment procedures permit in-class observation).

[108] 34 C.F.R. §300.503(e) (1988).

[109] OSEP Policy Letter, EHLR 211:227 (1980) (a school district may impose limits on the number of miles away from the district an evaluation can be conducted, so long as this does not prevent parents from obtaining an appropriate evaluation of their child); OSEP Policy Letter, 16 EHLR 735 (1990) (since 34 C.F.R. §300.542 requires a member of the evaluation team to conduct an in-class observation when a child is suspected of having a learning disability, an independent evaluator must be given the same opportunity).

[110] OSEP Policy Letter, EHLR 211:227 (1980) (a school district can impose minimum requirements for qualifications of evaluators— such as licensure—so long as those requirements are based upon state standards). This policy letter also provides that an LEA can preclude the services of a particular evaluator if the LEA has earlier found that particular evaluator to be unsatisfactory.

[111] OSEP Policy Letter, EHLR 211:227 (1980) (a school district can impose upper limits on the cost of an evaluation if such limits are based upon a determination of cost for providing an equal assessment by the school district). *See also, Max M. v. Thompson*, 592 F. Supp. 1437 (N.D. Ill. 1984), 1984-85 EHLR 556:227, 231 (LEA only has to pay minimum cost as if LEA had performed the evaluation). Presumably, as with locational limits, cost limits cannot be applied so as to prevent parents from obtaining an appropriate evaluation.

[112] *See, e.g., Hudson v. Wilson*, 828 F.2d 1059 (4th Cir. 1987), 1987-88 EHLR 559:139 (a parent is entitled to reimbursement of IEE expense for one evaluation, but not for multiple evaluations); *Hiller v. Board of Education of the Brunswick Central School District*, 687 F. Supp 735 (N.D.N.Y. 1988), 15 EHLR 441:194 (parents are entitled to payment for only one IEE).

Ultimately, the question of whether an LEA must pay for an IEE of a handicapped child must be resolved on a case-by-case basis. A school district's financial responsibility turns on facts unique to the particular situation being addressed, such as whether the LEA evaluation is appropriate,[114] whether the IEE is appropriate, and whether the IEE merely duplicates or corroborates an already existing LEA evaluation. Further, the nature of the evaluation in question will vary based upon the needs of the child and upon what is relevant in order to determine a FAPE for the particular handicapped child. Thus, evaluations can take the form of a psychological evaluation,[115] a psychiatric evaluation,[116] or any evaluation designed to determine the nature and extent of special education and related services required.[117]

VI. Third-Party Payments

A. Private Insurance

1. Availability of Insurance Benefits

The EAHCA guarantees every handicapped child a right to a FAPE.[118] The "free" portion of a FAPE is defined as "special education and related services that . . .

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[113] *See, e.g., Doe v. Board of Public Education of Nashville-Davidson County*, 15 EHLR 441:106 (M.D. Tenn. 1988) (in authorizing school district payment for multiple IEEs, the court stated that *Hudson v. Wilson* addressed corroborative evaluations when directing no payment for multiple evaluations).

[114] *See, e.g., Mullen v. District of Columbia*, 16 EHLR 792 (D.D.C. 1990) (where LEA psychological evaluation concluded that child was not learning disabled and independent neuropsychological evaluation determined that child was learning disabled, hearing officer's finding that child was learning disabled entitled parents to reimbursement for cost of IEE).

[115] *See, e.g., Doe v. Board of Public Education of Nashville-Davidson County*, 15 EHLR 441:106 (M.D. Tenn. 1988) (psychological evaluation initially not paid for by school district; after hospitalization due to suicide attempt, however, LEA agreed to pay for psychological evaluation).

[116] *See, e.g., Doe v. Board of Public Eduation of Nashville-Davidson County*, 15 EHLR 441:106 (M.D. Tenn. 1988) (where a psychologist recommended assessment for diagnostic and assessment purposes, the court ordered the LEA to pay for psychiatric IEE).

[117] *See, e.g., Winfield v. School Board of Fairfax County*, 1979-80 EHLR 551:269 (Cir. Ct. Fairfax Co., Va. 1979) (LEA ordered to pay for IEE that was to include nature and extent of special education and related services, including programmatic issues).

[118] *See* 20 U.S.C.A. §1401(a)(18) (1990).

have been provided at public expense. . . ."[119] The regulations promulgated pursuant to the EAHCA provide that

> [n]othing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a handicapped child.[120]

The purpose of this regulation is not to alleviate school districts' responsibility to pay for services, but simply to prevent insurers from disclaiming applicable responsibility. Parents may use their insurance benefits, or permit public agencies to access those benefits, to pay for related services.[121] When parents voluntarily choose to access their private insurance for such purposes, an insurance company cannot disclaim financial responsibility by claiming that the LEA is obligated under the EAHCA to provide the services for which financial payment is being sought.[122] In the event that insurance proceeds pay for only part of the cost of providing an educational service, the LEA must pay the remaining portion of the cost in order to guarantee that the parents and child are provided a FAPE.[123]

Whether parents may be *required* to make their insurance benefits available for services for their disabled children—as distinguished from whether they may voluntarily access their insurance benefits—was, for some time, less clear. The DOE made an early pronouncement that "there is nothing in the regulations which requires that parents of handicapped children use their insurance benefits for related services."[124] The DOE has since clarified this broad pronouncement, however, by stating that

> mandatory use of parents' insurance proceeds is prohibited, where compelling the use of such funds would "pose a realistic threat" that parents would suffer a "financial loss."[125]

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[119] 20 U.S.C.A. §1401(a)(18) (1990). *See also*, 20 U.S.C.A. §1412(2)(B) (1990) and 34 C.F.R. §300.4 (1988).

[120] 34 C.F.R. §300.301(b) (1988).

[121] *See, e.g.*, BEH Policy Letter, EHLR 211:137 (1979); BEH Policy Letter, EHLR 211:05 (1978).

[122] *See, e.g.*, OSEP Policy Letter, EHLR 213:213 (1988).

[123] BEH Policy Letter, EHLR 211:05 (1978) (if parents elect to use insurance benefits, the remainder of the cost for services, beyond those costs paid for by the insurer, must be provided at no cost to parents).

[124] BEH Policy Letter, EHLR 211:102, 103 (1979).

[125] OSERS Policy Letter, EHLR 213:137, 138 (1988), quoting from 45 *Fed. Reg.* 86390 (1980). This Policy Letter responded to an inquiry concerning a proposed state law that would require an educational agency to pay all applicable deductible and co-insurance charges otherwise payable by a parent so as to then authorize the educational agency to claim reimbursement from the parents' private insurance proceeds. *See also*, OSEP Policy Letter, EHLR 213:211 (1989) (parents not required to provide a wheelchair to be paid for by private insurance proceeds where the parents would incur financial loss).

Accordingly, under the DOE's interpretation, parents may demand reimbursement from the LEA when they have used insurance proceeds to pay for mandated services and such usage has depleted limited insurance benefits.[126]

The DOE has provided other clarification with respect to the question of what constitutes financial loss to parents. The DOE stated:

> [P]ublic agencies may not require parents to use their own insurance proceeds if the parents would incur a financial loss in doing so. Financial losses include, but are not limited to:
>
> 1. A decrease in available lifetime coverage or any benefit under an insurance policy;
> 2. An increase in premiums or the discontinuation of the policy;
> 3. An out-of-pocket expense such as the payment of a deductible amount incurred in filing a claim.[127]

The DOE concluded by noting that "[f]inancial losses do not include incidental costs such as time needed to file a claim or the postage needed to mail the claim."[128]

In addition to indicating what *cannot* be required of parents with respect to the use of insurance benefits, the DOE has also clarified at least one instance in which an LEA *can* require parental action. The DOE said an LEA can compel parents to file a claim with their insurance company if the only financial effect of making such a claim is an increase in the premiums and the LEA offers to pay the increased cost of the premiums.[129] The DOE also noted that a parental refusal to file an insurance claim—even where doing so would result in no financial loss to the parents—does not relieve the LEA of its obligation to provide the handicapped child with a FAPE.[130]

The DOE's position concerning an LEA's ability to compel parents to file a claim with their insurance company was based in part on *Seals v. Loftis*.[131] In that case, an LEA recommended a pediatric evaluation of a handicapped child after the child suffered three grand mal seizures. The pediatrician referred the student for both psychological and neurological evaluations. The court held that the parents were not required to use private insurance benefits for the psychological evaluation, because the insurance policy contained a lifetime ceiling (or cap) on the extent of insurance benefits available for psychological services. Thus, the use of insurance benefits for that purpose would reduce the total benefits available to the parents. The court required the parents to use their insurance to pay for the cost of the neurological evaluation, however, since there was no maximum insurance limit for neurological and other medical services. The court concluded that insofar as the neurological evaluation was concerned, the LEA was responsible only for those costs in excess of the amount of funds available from insurance proceeds.

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[126] *See, e.g., Shook v. Gaston County Board of Education*, 882 F.2d 119 (4th Cir. 1989), 15 EHLR 441:561 (mentally handicapped child was granted reimbursement for depletion of private health insurance benefits used to pay for her education at a private residential school).

[127] OSEP Policy Letter, EHLR 211:292 (1982).

[128] *Id.*

[129] OSEP Policy Letter, 16 EHLR 549 (1990).

[130] *Id.*

[131] 614 F. Supp. 302 (E.D. Tenn. 1985), 1985-86 EHLR 557:110.

2. Exclusionary Clauses

Many insurance policies contain a so-called "exclusionary clause." Such a clause excludes insurance coverage for services or equipment that the insured is entitled to receive under federal law, such as the EAHCA. The DOE has stated that EAHCA regulation 34 C.F.R. §300.301[132] does not nullify an insurance contract's exclusionary clause.[133] That interpretation does not answer the question, however, of whether, or to what extent, an exclusionary clause can preclude an insurance carrier from being financially responsible for special education or related services.

At least one court has analyzed the application of an exclusionary clause in this context. In *Chester County Intermediate Unit v. Pennsylvania Blue Shield*[134] two IEUs and parents of two handicapped children sued a health insurance company that refused to pay claims for physical therapy services being provided the children as an educationally related service. The insurance company sought to dismiss the action on the ground that the EAHCA placed the burden on the educational agencies to provide physical therapy at public expense. In denying the motion, the court stated that "insurers are not relieved of contractual obligations *they would otherwise have had* had the EAHCA not been enacted."[135]

Notwithstanding that ruling, the court in *Chester County* held that the insurance company was not obligated to pay for the physical therapy because the language of the insurance policy required the insured to incur the costs and submit bills for reimbursement of those expenses. Since the *IEUs* were providing the therapy services, the insurance was unavailable for *reimbursement* to the IEUs because the contracts precluded reimbursement to anyone other than the insured. The district court opined that the fact

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[132] 34 C.F.R. §300.301 (1988) provides:

> (a) Each State may use whatever State, local, Federal and private sources of support are available in the State. . . .
> (b) Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a handicapped child.

[133] BEH Policy Letter, EHLR 211:76 (1978).

[134] 15 EHLR 441:535 (M.D. Pa. 1989).

[135] 15 EHLR at 441:538. Since the issue before the court was in the context of a motion to dismiss, the court necessarily assumed the facts were, for the purposes of the motion, those facts alleged by the plaintiffs in their complaint. Thus the court assumed that the children would have been prescribed to receive physical therapy even if there had been no EAHCA in effect.

> [t]hat the EAHCA regulations permit a modicum of reliance on private insurance, does not justify an interpretation of the contract wholly at odds with its plain language.[136]

On appeal, the Third Circuit affirmed the district court's dismissal of the plaintiffs' action, but on different grounds.[137] The circuit court explained:

> [W]e are reluctant to decide this appeal as did the district court on the basis of the reimbursement scheme. . . . It may be that the district court correctly analyzed these issues, but we are sensitive to plaintiffs' contention that there are relevant facts which were not of record and which should have been the subject of discovery. Accordingly, we leave undecided the issue of the reimbursement scheme.[138]

In affirming the district court's opinion, the appellate court relied on other exclusionary language in the major medical policy. The court stated:

> [the] insurance agreements exclude from payment by Blue Cross services or supplies for which the subscriber is not legally obligated to pay as well as services or supplies for which the subscriber is entitled to have paid or obtain without cost under the laws or regulations of any federal, state, provincial or local government or any political subdivision. . . . It is undisputed that the children . . . are entitled "to obtain without cost" under the [EAHCA] the physical therapy services provided and the parents are "not legally obligated to pay" for these services. The exclusionary provisions, therefore, explicitly preclude Blue Cross/Blue Shield coverage of the physical therapy. . . .[139]

In upholding the exclusionary language in the insurance policy, the court stated:

> [W]e cannot conclude, without clear statutory support, that Congress intended the [EAHCA] to abrogate such a provision in a privately negotiated contract. We are confident that Congress would not have done so without explicitly so providing.
>
> Because we are unable to discern a congressional intent to intervene in the contractual relationship between insurers and subscribers, we hold that on the face of the plain terms of the exclusions in the Major Medical policy, Blue Cross/Blue Shield are not liable for the costs of the physical therapy at issue in this case.[140]

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[136] 15 EHLR at 441:539.

[137] *Chester County Intermediate Unit v. Pennsylvania Blue Shield*, 896 F.2d 808 (3d Cir. 1990), 16 EHLR 925.

[138] 896 F.2d at 811-12, 16 EHLR at 927.

[139] 896 F.2d at 813, 16 EHLR at 927.

[140] 896 F.2d at 815, 16 EHLR at 929.

If the *Chester County* decision is followed by other courts, those insurance carriers that do not yet have language similar to the language in the Pennsylvania Blue Shield policy will presumably amend their policies accordingly, resulting in the unavailability to parents of handicapped children of private insurance coverage for these services.

3. Insurers' Standing

In situations in which handicapped students are receiving services that are paid for by insurance policies, some insurance companies have attempted to shift the financial burden to an educational agency. Two cases before the same court are illustrative of the judiciary's negative response to such efforts.

In *Allstate Insurance Company v. Bethlehem Area School District*[141] a student who had been injured in an auto accident required a trained attendant to maintain a permanent tracheostomy. The insurance company had been paying the medical costs, including the costs of the attendant, since the date of the accident. The company filed suit seeking payment from the LEA for the services provided during the school day. The court held that the insurance company lacked standing to make a claim under the EAHCA. The court opined that the EAHCA was intended for the protection of a particular class of persons—handicapped children and their parents—and not for the protection of insurance companies.

The court reached the same conclusion in *Gehman v. Prudential Property and Casualty Company*.[142] In that case, a handicapped child sued the private insurance carrier to require the company to continue payment for special education services the company had been paying for since the time the child suffered head injuries. The insurance company filed a third-party complaint against the LEA and SEA, alleging that the educational agencies bore the responsibility to pay for the child's special education. The court concluded, as in the *Allstate* case, that the insurance company lacked standing under the EAHCA to bring the claim.

B. Medicaid Reimbursement

The Medicaid program, authorized under Title XIX of the Social Security Act,[143] is designed to provide medical assistance to individuals whose income and resources are insufficient to meet the costs of necessary care and services. Under the Medicaid program, states that choose to reimburse certain costs of medical care for qualified needy persons receive federal financial assistance for services specified in a state plan approved by the Secretary of the Department of Health and

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[141] 678 F. Supp. 1132 (E.D. Pa. 1987), 1987-88 EHLR 559:364.

[142] 702 F. Supp. 1192 (E.D. Pa. 1989), 15 EHLR 441:321.

[143] 42 U.S.C.A. §§1396-1396s (1983 and West Supp. 1990).

Human Services (DHHS). Although state participation in the Medicaid program is optional, once a state elects to participate in the program it must comply with the requirements of the law.

For some time after enactment of the EAHCA, the DHHS denied Medicaid reimbursement for special education and related services provided pursuant to an IEP because these services were covered under the EAHCA. In the opinion of the authors, the DHHS's position was unsound.

The Social Security Act states that the broad purposes of the Medicaid program are to enable

> each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care. . . .[144]

Many of the "related services" under the EAHCA are similar to services falling within the meaning of the "medical assistance" and "rehabilitative services" to be provided under the Social Security Act. For example, for Medicaid purposes, a rehabilitative service

> includes any medical or remedial services recommended by a physician or other licensed practitioner of the healing arts, within the scope of his practice under State law, for maximum reduction of physical or mental disability and restoration of a recipient to his best possible functional level.[145]

This definition is consistent with the traditional related services of speech therapy, physical therapy and occupational therapy.

The DHHS policy denying Medicaid reimbursement for special education and related services was undercut in *Commonwealth of Massachusetts v. Heckler*, however.[146] In that case, Massachusetts sought review of a decision of the DHHS Grant Appeals Board of the Health Care Financing Administration (HCFA) that disallowed reimbursement for certain services provided to persons residing in state-owned intermediate care facilities for mentally retarded persons (ICF/MRs). Those services included teaching residents to signal for food when they were ready to eat; providing auditory stimulation; encouraging social interaction with adults; and training residents to remember letters and their names, to ask for a drink by reaching with a cup, to eat with a spoon and to sort out objects. The Massachusetts Department of Public Welfare was responsible for administering the Massachusetts Medicaid program, the State Department of Mental Health (DMH) operated the ICF/MRs, and the State Department of Education (DOE) established and maintained a school department for school-age children in each ICF/MR. Many of the services—such as those involved in *Heckler*—were jointly provided by DMH and DOE. The DHHS denied Medicaid reimbursement for these services in reliance upon a provision of the Public Health regulations providing that

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[144] 42 U.S.C.A. §1396 (West Supp. 1990).

[145] 42 C.F.R. §440.130(d) (1989).

[146] 616 F. Supp. 687 (D. Mass. 1985).

> [p]ayments to institutions for the mentally retarded or persons with related conditions and to psychiatric facilities or programs providing inpatient psychiatric services to individuals under age 21 may not include reimbursement for vocational training and educational activities.[147]

The district court in *Heckler* reversed the DHHS decision. In so ruling, the district court faulted the DHHS's reasoning by stating:

> [The DHHS] defined "education" by reference to state and federal education statutes and to the Commonwealth's method of administering the services in question, rather than to the nature of the services themselves. This approach errs on the side of administrative convenience at the expense of compliance with the Medicaid statute in our view.
>
> §441.13(b) does not define "educational activities." The services provided. . . , involving for the most part therapies designed to train the mentally retarded to function at some minimal level in society, cannot be defined as "traditional" or "academic" education, which clearly would be excluded under the regulation. Yet these Medicaid covered services could perhaps be described as "special education" or "related services" as defined by . . . EAHCA.[148]

The district court concluded that "[a]ll training or instruction is not education . . ." and held that "[t]he fact that these services are provided by an agency of the Commonwealth's education department does not bar their classification as Medicaid covered habilitative services."[149]

The First Circuit affirmed the district court's opinion in *Heckler*.[150] On appeal, the Secretary of DHHS raised three arguments. First, the Secretary claimed that the EAHCA was established specifically to fund and provide special education and related services and that Congress did not intend, by enactment of the Act, to fund such services under the more general terms of the pre-existing Medicaid statute. The circuit court rejected this argument for two reasons: First, because the

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[147] 42 C.F.R. §441.13(b) (1989).

[148] 616 F. Supp. at 693-94 (citing *Abrahamson v. Herschman*, 701 F.2d 223, 228 (1st Cir. 1983), 1982-83 EHLR 554:403, 407).

[149] 616 F. Supp. at 694.

[150] 816 F.2d 796 (1st Cir. 1987), 1986-87 EHLR 558:344. This decision was later affirmed in *Bowen v. Massachusetts*, 487 U.S. 879, 108 S. Ct. 2722 (1988), 1987-88 EHLR 559:422. Only jurisdictional and procedural issues were before the Supreme Court.

EAHCA was enacted four years after the relevant portions of the Social Security Act; second, because the court found no intent by Congress—when enacting the EAHCA—to cut back on the scope of reimbursible services available under the Medicaid program. The court also relied upon the legislative history of the EAHCA, which provided, in part, that

> Any funds available from the Federal Government are clearly in addition to funds provided under this act. . . .[151]

The second argument proferred by the DHHS was that the Medicaid program relies upon the concept of "payor of last resort" by requiring

> that the state administering agency "ascertain the legal liabilities of third parties to pay for care and services (available under the [Medicaid] plan)" and refuse to provide that care or service, or, where the agency has already provided care, "seek reimbursement for such assistance to the extent of legal liability."[152]

In disagreeing with this argument, the First Circuit noted that—insofar as the Department of Public Welfare (DPW) was concerned—DOE was not a third party since DOE and DPW were merely different departments of the same state.

The third and final argument raised on appeal by the DHHS was that the agency was interpreting its own regulation and, as such, that interpretation should be given deference so long as the DHHS was not acting unreasonably. The First Circuit concluded the DHHS's interpretation exceeded its authority under the statute because the agency was applying a definition of "education" that was too broad. The appellate court stated:

> If the concept of "education" is expanded to include, for example, teaching a severely retarded child to control the rate at which he is fed so that he does not get food into his lungs (one of the "special education" services at issue in this case), then the exclusion goes beyond statutory authority.[153]

Finally, the circuit court concluded that when the definitions of medical assistance and education overlap, medical assistance must prevail—rather than the reverse, as contended by the DHHS.

In 1988, Congress picked up the gauntlet laid down by the First Circuit when it amended the Medicare Catastrophic Coverage Act of the Social Security Act[154] to state that nothing in Title XIX

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[151] 816 F.2d at 803, citing 1975 *U.S. Code Cong. and Admin. News* 1425, 1447.

[152] 816 F.2d at 803, citing 42 U.S.C. §1396a(a)(25).

[153] 816 F.2d at 804.

[154] 42 U.S.C.A. §1396b(c) (West Supp. 1990).

> shall be construed as prohibiting or restricting, or authorizing the Secretary to prohibit or restrict, payment . . . for medical assistance for covered services furnished to a handicapped child because such services are included in the child's individualized education program established pursuant to . . . the Education of the Handicapped Act or furnished to a handicapped infant or toddler because such services are included in the child's individualized family service plan. . . .

The intent of Congress, as expressly stated when enacting this amendment, was to make it clear that

> Federal Medicaid matching funds are available for the cost of health services, covered under a State's Medicaid plan, that are furnished to a handicapped child or a handicapped infant or toddler, even though such services are included in the child's individualized education program or individualized family service plan. . . . While the State education agencies are financially responsible for educational services, in the case of Medicaid-eligible handicapped child (sic), State Medicaid agencies remain responsible for the "related services" identified in the child's IEP if they are covered under the State's Medicaid plan, such as speech pathology and audiology, psychological services, physical and occupational services, and medical counseling and services for diagnostic and evaluation purposes.[155]

Clearly, therefore, Medicaid may be made available under the proper circumstances to reimburse educational agencies for the cost of both special education and related services. Since each state has its own statute establishing its Medicaid program and its own state plan, some states may require an amendment to existing legislation or modification of the state plan to enable LEAs to access Medicaid funds while other state plans will already permit such access.[156]

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[155] 134 *Cong. Rec.* H3840 (daily ed. June 1, 1988).

[156] An LEA seeking Medicaid reimbursement may confront additional hurdles, however. Since the availability of federal funds under the Medicaid system is dependent upon matching funds from the state, some states may choose not to avail themselves of federal funding for related services due to the increased cost to the state.

Furthermore, since Medicaid is a payor of last resort, it is unclear what obligation, if any, an LEA will have to first pursue parents' private insurance. This could present particular difficulty if parents refuse to provide insurance information to the LEA.

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Education for All Handicapped Children Act: Appropriateness, Least Restrictive Environment and Related Services

I. Introduction

This chapter analyzes the substantive issues involved in the provision of a free appropriate public education (FAPE) for a handicapped child. What is "appropriate," of course, will differ with respect to each child, since appropriateness requires attention to the unique needs of each individual. This chapter addresses the various facets of appropriateness—the standards applied by the courts, the interplay between state educational standards and EAHCA guarantees, the extent to which cost may be considered, and the state of the law regarding an extended school year to address the needs of some handicapped children.

The EAHCA's directive to segregate handicapped children as seldom as possible is commonly referred to as the Act's least restrictive environment (LRE) mandate. This chapter discusses the secondary role that LRE plays to appropriateness and analyzes the differing LRE standards applied by the courts.

This chapter also reviews the statutory, regulatory and case law defining the related services (supportive services) that are authorized under the Act. These services, on a child-by-child basis, often relate to and overlap with the determination of appropriateness, for, in order to provide a FAPE, a school district must provide each handicapped child with a proper placement and adequate support services.

The three substantive areas addressed in this chapter—appropriateness, least restrictive environment and related services—are the primary substantive concerns for LEAs and parents. They are also, because of their importance and their subjectivity, the cause of most litigation under the EAHCA.

II. Appropriateness

Every educationally handicapped child is entitled under the EAHCA to receive a free appropriate public education. A FAPE is defined in the Act as

> [S]pecial education and related services that
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> (A) have been provided at public expense, under public supervision and direction, and without charge,
>
> (B) meet the standards of the State educational agency,
>
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and
>
> (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.[1]

The term "special education" means

> [s]pecially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.[2]

The term "related services" is defined as "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education. . . ."[3]

The Supreme Court was called upon to address the meaning of an appropriate education in its first case involving the EAHCA. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* the Court attempted to provide some guidance for the lower courts to apply in future cases.[4]

A. Standards To Be Applied by Courts

In *Rowley*, the issue before the Supreme Court was whether the IEP recommended by the LEA for Amy Rowley's first grade educational program was sufficient to provide her with an appropriate education as required by the Act. Amy, a deaf student with minimal residual hearing, was an excellent lip-reader. She was in a regular first grade classroom and had been provided with an FM hearing aid. She also received instruction from a tutor of the deaf for one hour each day and speech therapy for three hours per week. Amy's parents were concerned that Amy was missing too much of the classroom instruction by having to rely solely upon lip-reading and hearing aids. Because they were dissatisfied with the adequacy of the services being provided, her parents requested that a qualified sign-language interpreter assist Amy in all of Amy's academic classes.

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[1] 20 U.S.C.A. §1401(a)(18) (1990).

[2] 20 U.S.C.A. §1401(a)(16) (1990).

[3] 20 U.S.C.A. §1401(a)(17) (1990).

[4] 458 U.S. 176, 102 S. Ct. 3034 (1982), 1981-82 EHLR 553:656.

The hearing officer at the due process hearing agreed with the school district's determination that an interpreter was not necessary because " 'Amy was achieving educationally, academically, and socially' without such assistance."[5] An administrative appeal by the parents to the New York State Commissioner of Education resulted in affirmance of the hearing officer's decision.

The federal district court, to the contrary, subsequently ruled in favor of the parents. Despite finding that " 'Amy performs better than the average child in her class and is advancing easily from grade to grade,' "[6] that court was more impressed by the fact that Amy " 'understands considerably less of what goes on in class than she could if she were not deaf' and thus 'is not learning as much, or performing as well academically, as she would without her handicap'."[7] These findings led the district court to conclude that Amy was not receiving a free appropriate public education, defined by that court as " 'an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children'."[8] The Second Circuit affirmed the district court's decision.[9]

In reversing the Second Circuit's decision, the Supreme Court addressed the question of appropriateness as it related to Amy Rowley. The Court also attempted to provide some guidance to the lower courts to assist them in the myriad of cases in which they would have to address the question of appropriateness under the EAHCA. The Supreme Court cautioned that

> courts must be careful to avoid imposing their view of preferable educational methods upon the States. . . . [I]t seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories in a proceeding conducted pursuant to [the Act].[10]

In describing the proper role of the court when addressing cases under the EAHCA, the Supreme Court quoted from those provisions of the EAHCA directing courts to receive records of the administrative proceedings, hear any additional evidence, and base their decisions on a preponderance of all the evidence presented.[11] The Court provided no further direction, other than to indicate that "due weight" should be given to the administrative proceedings.[12]

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[5] 458 U.S. at 185, 102 S. Ct. at 3040, 1981-82 EHLR at 553:660.

[6] 458 U.S. at 185, 102 S. Ct. at 3034, 1981-82 EHLR at 553:660.

[7] 458 U.S. at 185, 102 S. Ct. at 3034, 1981-82 EHLR at 553:660.

[8] 458 U.S. at 186, 102 S. Ct. at 3034, 1981-82 EHLR at 553:660.

[9] 632 F.2d 945 (2d Cir. 1980), 1980-81 EHLR 552:101.

[10] 458 U.S. at 207-08, 102 S. Ct. at 3051, 1981-82 EHLR 553 at 670-71.

[11] 458 U.S. at 205, 102 S. Ct. at 3050, 1981-82 EHLR at 553:669, citing 20 U.S.C. §1415(e)(2).

[12] 458 U.S. at 206, 102 S. Ct. at 3051, 1981-82 EHLR at 553:670. *See* chapter 14 of this text, *supra*, for a more detailed discussion of judicial review.

The principal guidance provided by *Rowley* is the instruction that a court's role in an EAHCA lawsuit is to make a twofold inquiry described as follows:

> First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.[13]

The first inquiry required by *Rowley* imposes a procedural litmus test. The Court perceived a congressional conviction that adequate compliance with the procedures prescribed in the Act would, in most situations, assure substantive compliance with the intent of the Act.[14]

The second prong of the *Rowley* approach, in which courts are to determine whether the IEP is reasonably calculated to enable the child in question to receive educational benefits, has been the subject of much litigation and some confusion. Accordingly, close scrutiny of the Supreme Court's explanation of this standard is essential.

The Supreme Court summarized the import of the statutory definitions of FAPE, special education and related services, by stating that

> . . . if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" as defined by the Act.[15]

In the view of the Supreme Court, no substantive standard prescribing the level of education to be accorded handicapped children is included in the Act.[16] Thus, in the Court's view "the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside."[17]

The Court referred to the *Mills* and *PARC* cases as establishing the principles that guided the drafters of the Act.[18] After further reviewing the legislative history of the EAHCA, the Court concluded that the Act establishes a "basic floor of opportunity"[19] consisting of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."[20]

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[13] 458 U.S. at 206, 102 S. Ct. at 3051, 1981-82 EHLR at 553:670.

[14] 458 U.S. at 206-07, 102 S. Ct. at 3051, 1981-82 EHLR at 553:670. An in-depth discussion of the procedural complexities involved in, and surrounding, the EAHCA appears in chapters 13, 14 and 15 of this text, *supra*.

[15] 458 U.S. at 189, 102 S. Ct. at 3042, 1981-82 EHLR at 553:662.

[16] 458 U.S. at 189, 102 S. Ct. at 3042, 1981-82 EHLR at 553:662.

[17] 458 U.S. at 192, 102 S. Ct. at 3043, 1981-82 EHLR at 553:663.

[18] *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth*, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (E.D. Pa. 1972). For a more detailed discussion concerning these cases, *see* chapter 2 of this text, *supra*.

In holding that Amy Rowley was not entitled to a sign-language interpreter, the Court relied in large part on the fact that Amy was passing from grade to grade in a public school program. The Court stated:

> When the handicapped child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit.[21]

In *Rowley*, Amy was not only passing from grade to grade; she was in the upper half of her class.

The Court was careful, however, to set some limits to the scope of its holding in *Rowley*. First, the Court cautioned lower courts from placing too much precedence upon its decision in *Rowley*:

> We do not hold today that every handicapped child who is advancing from grade to grade in a regular public school system is automatically receiving a "free appropriate public education."[22]

The second cautionary comment made by the Court emphasized the individualized nature of the inquiries to be addressed under the EAHCA. The Court stated: "we do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act."[23] Finally, the Court balanced its statement that the EAHCA provides only a basic floor of opportunity guaranteeing a right to educational benefit, by further stating that

> [t]he determination of when handicapped children are receiving *sufficient* educational benefits to satisfy the requirements of the Act presents a more difficult problem.[24]

The Court limited its description of sufficient educational benefit to the circumstances presented by Amy Rowley.

Thus the Supreme Court in *Rowley* set forth a two-pronged test, one procedural and one somewhat substantive, for courts to apply in determining whether handicapped children have been provided a FAPE. The Court indicated that the individual needs of the child, as determined by an IEP, are the appropriate focus. Furthermore, the Court held that handicapped children do not have an enforceable right to achieve their maximum potential, but rather are entitled only to receive *some* educational benefit, the sufficiency of which is to be left to a case-by-case analysis.[25]

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[19] 458 U.S. 201, 102 S. Ct. at 3048, 1981-82 EHLR at 553:667.

[20] 458 U.S. at 201, 102 S. Ct. at 3048, 1981-82 EHLR at 553:667.

[21] 458 U.S. at 207, n.28, 102 S. Ct. at 3051, n.28, 1981-82 EHLR at 553:670, n.28.

[22] 458 U.S. at 203, n.25, 102 S. Ct. at 3049, n.25, 1981-82 EHLR at 553:668, n.25.

[23] 458 U.S. at 202, 102 S. Ct. at 3049, 1981-82 EHLR at 553:668.

[24] 458 U.S. at 202, 102 S. Ct. at 3048, 1981-82 EHLR at 553:668 (emphasis added).

B. Application of the Federal Standard

1. Procedural Violations as Denial of a FAPE

The EAHCA and its implementing regulations establish procedural safeguards for children and their parents.[26] These procedural protections for families act as mandates upon LEAs, intermediate educational units (IEUs) and state educational agencies (SEAs).

The Supreme Court in *Rowley* clearly established the principle that failure of an educational agency to comply with the procedures set forth by the Act constitutes sufficient reason to rule that a handicapped child has been denied a FAPE.[27] If an educational agency fails to follow the proper procedures, and a court determines that such failure was significant, the educational agency will be found to have violated the law.[28]

2. Reasonably Calculated To Provide Educational Benefits

The second prong of the *Rowley* test requires a child's IEP to be reasonably calculated to provide educational benefits. The Supreme Court made it clear that a handicapped child is not entitled to an IEP designed to permit him or her to reach his or her ultimate or optimum potential. Stated another way, the Act does not require a handicapped child to be provided with the best education. The EAHCA only entitles a handicapped child to an "appropriate" education.[29]

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[25] *See, e.g, Grkman v. Scanlon*, 563 F. Supp. 793 (W.D. Pa. 1983), 1983-84 EHLR 555:101 (despite similarities between Amy Rowley and Lindy Sue Grkman, Ms. Grkman's greater hearing loss and shyness in interacting with classmates warranted ordering a current evaluation and IEP).

[26] 20 U.S.C.A. §1415 (1990) and 34 C.F.R. §§300.500-76 (1988). For a more detailed description of procedural protections, *see* chapters 13, 14 and 15 of this text, *supra*.

[27] 458 U.S. at 206, 102 S. Ct. at 3051, 1981-82 EHLR at 553:670.

[28] *See, e.g., Taylor v. Board of Education of the Copake-Taconic Hills Central School District*, 649 F. Supp. 1253 (N.D.N.Y. 1986), 1986-87 EHLR 558:243 (LEA, in recommending placement of multi-handicapped child in IEU self-contained class rather than in separate facility, failed to give consideration to opinions of professionals who knew the child best); *Hall v. Vance County Board of Education*, 774 F.2d 629 (4th Cir. 1985), 1985-86 EHLR 557:155 (LEA's repeated failure to notify parents of rights under EAHCA constituted grounds to find child had been denied a FAPE).

To determine whether an IEP is reasonably calculated to provide educational benefit for a child, an analysis of the unique needs of that particular child must be pursued. This individualized analysis by the court (which the LEA is also required to do in developing the IEP) often provides the significant information necessary to determine whether a particular placement is appropriate.[30] In other situations, such an analysis may show that a particular policy or procedure is an impediment to designing a personalized placement or program.[31]

The extent of educational benefit being received, or to be received, by the child is a significant factor in determining appropriateness. In *Polk v. Central Susquehanna Intermediate Unit 16*,[32] for example, the Third Circuit stated that "the *Rowley* Court described the education that must be provided under the EHA as 'meaningful.' The use of the term 'meaningful' indicates that the Court expected more than de minimis benefit."[33] The difficulty for the courts is determining, on a case-by-case basis, when a child is receiving only minimal benefit and when the child is receiving sufficient educational benefit. The distinction between minimal and sufficient educational benefit cannot be made in a vacuum. A close appraisal of the child's past progress, or lack of progress, can frequently be the strongest indicator of the appropriateness of a particular placement. Thus, courts have felt comfortable in concluding that a child is receiving an appropriate education when he or she has progressed adequately in a given placement.[34]

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[29] *See, e.g.*, *Gregory K. v. Longview School District*, 811 F.2d 1307 (9th Cir. 1987), 1986-87 EHLR 558:284 (LEA not required to provide tutor for mildly mentally retarded child in addition to combined regular education and special education placement, even though providing a tutor might be more beneficial to the student); *Department of Education, State of Hawaii v. Katherine D.*, 727 F.2d 809 (9th Cir. 1984), 1983-84 EHLR 555:276 (when an offer of emergency health services for a child with health needs was appropriate, it was irrelevant if services at a segregated placement were superior); *Springdale School District #50 of Washington County v. Grace*, 693 F.2d 41 (8th Cir. 1982), 1982-83 EHLR 554:200 (school district program for deaf child was reasonably calculated to provide educational benefit and therefore was appropriate, despite presumably more effective placement at the State School for the Deaf); *Romeo v. Ambach*, 1984-85 EHLR 556:488 (E.D.N.Y. 1985) (full-day self-contained class for learning-disabled student provided a FAPE, even though the child would not thereby reach his full potential); *Martin v. School Board of Prince George County*, 1986-87 EHLR 558:129 (Va. App. 1986) (placement in the emotionally disturbed class in public school satisfied FAPE requirement even though the child might receive greater educational benefit in a residential program).

[30] *See, e.g.*, *County School Board of Loudoun County v. Lower*, 1983-84 EHLR 555:130 (E.D. Va. 1983) (placement of a handicapped girl in a class with five boys all younger than her and functioning below her level was inappropriate in light of the girl's emulation of peers and particular need to be placed with a suitable peer group).

[31] *See, e.g.*, *Georgia Association of Retarded Citizens v. McDaniel*, 716 F.2d 1565 (11th Cir. 1983), 1983-84 EHLR 555:251, *rev'd on other grounds*, 740 F.2d 902 (11th Cir. 1984), 1984-85 EHLR 556:187 (state policy limiting education to 180 days per year prohibited individual consideration of needs of plaintiff and members of certified class and precluded development of IEPs reasonably calculated to enable student to receive a FAPE). *See also*, the discussion concerning the rights to an extended school year appearing later in this chapter.

[32] 853 F.2d 171 (3d Cir. 1988), 15 EHLR 441:130.

[33] 853 F.2d at 182, 15 EHLR at 441:142. *See also*, *Hall v. Vance County Board of Education*, 774 F.2d 629 (4th Cir. 1985), 1985-86 EHLR 557:155 (dyslexic student, passed from year to year due to policy of social promotion, made only minimal academic achievement, which was insufficient to constitute a FAPE).

In addition to the matter of a student's progress, there is another issue that frequently must be considered when assessing whether a handicapped child is receiving an appropriate education. Since the EAHCA addresses *all* educationally handicapped children, many different disabilities and different degrees of severity of handicap must be addressed. Thus, the appropriateness of a child's education may be dependent upon the meaning of the term "education" with respect to that child. The required starting point for determining what "education" means for a particular child will obviously vary, based upon the child's disability and its severity and the individual characteristics of the child. For very severely disabled youngsters, education is often largely non-academic. In such situations an appropriate education requires addressing those skills that will assist the child to function as well as is reasonably possible—in an independent fashion.[35]

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[34] *See, e.g., Hall v. Vance County Board of Education, Id.* (student passed from year to year due to policy of social promotion and did not make significant academic progress and thus was denied a FAPE); *Garrick B. v. Curwensville Area School District*, 669 F. Supp. 705 (M.D. Pa. 1987), 1987-88 EHLR 559:155 (mixed category learning disabled/mentally retarded class with mainstreaming was appropriate since learning disabled children had progressed in that placement); *Martin v. School Board of Prince George County*, 1986-87 EHLR 558:129 (Va. App. 1986) (learning disabled student with behavioral problems was considered to have received a FAPE in placement in emotionally disturbed class since student had made significant progress in that placement).

[35] *See, e.g., Kerkam v. D.C. Board of Education*, 672 F. Supp. 519 (D.D.C. 1987), 1987-88 EHLR 559:210, *rev'd and remanded on other grounds*, 862 F.2d 884 (D.C. Cir. 1988) (severely retarded student was entitled to out-of-state placement at group home with day school placement since home itself is an important part of overall program); *Brown v. The Wilson County School Board*, 16 EHLR 718 (M.D. Tenn 1990) (placement at residential rehabilitation facility for brain-injured persons was appropriate because it addressed 21-year-old brain-injured woman's behavior problems, daily living skills and social skills); *Taylor v. Board of Education of the Copake-Taconic Hills Central School District*, 649 F. Supp. 1253 (N.D.N.Y. 1986), 1986-87 EHLR 558:243 (proposed placement for multi-handicapped child in IEU self-contained class was not appropriate since that class lacked a functional curriculum to address self-sufficiency skills); *Jenkins v. State of Florida*, 1984-85 EHLR 556:471 (M.D. Fla. 1985), *vac. and remanded on other grounds*, 815 F.2d 629 (11th Cir. 1987), 1986-87 EHLR 558:342 (the concept of education includes training in basic self-help skills); *Russell v. Jefferson Schoool District*, 609 F. Supp. 605 (N.D. Cal. 1985), 1984-85 EHLR 556:498 (proposed placement that would address only cognitive needs was not appropriate since it was not reasonably calculated to provide educational benefits with respect to the need for physical safety and language development); *Tolland Board of Education v. Connecticut State Board of Education*, 1984-85 EHLR 556:412 (D. Conn. 1985) (multihandicapped child with severe social and emotional problems and neurological handicap needed residential setting to address needs for social learning and social-behavioral objectives adequately).

For children with such disabilities as emotional problems, for example, addressing the child's needs that result from the disability cannot be limited merely to provision of academic services. Similarly, in order for deaf or hearing-impaired children to adapt to the hearing, speaking world, they need to be provided with intensive speech training. In such situations, " 'educational benefit' is a concept which embraces more than ordinary academic subjects."[36]

C. Incorporation of State Standards

The definition of a FAPE includes the requirement that the special education and related services provided to a handicapped child must meet the standards of the SEA.[37] This provision recognizes that education has traditionally been considered in the state's domain, rather than in the domain of the federal government. A FAPE, as construed in *Rowley*, consists of a properly developed IEP that is reasonably calculated to provide educational benefits to the child. In *Rowley*, however, the Court emphasized that this standard constitutes a federal floor of opportunity, but *not* a ceiling upon the right to educational services.[38] Accordingly, higher state standards are incorporated into the EAHCA whenever they are not inconsistent with the Act.[39]

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[36] *Tolland Board of Education v. Connecticut State Board of Education*, 1984-85 EHLR 556:412, 419 (D. Conn. 1985). *See also, Jefferson County Board of Education v. Breen*, 853 F.2d 853 (11th Cir. 1988), 15 EHLR 441:184 (21-year-old woman with head injury entitled to residential placement that could provide comprehensive treatment program combining behavioral intervention and cognitive remediation with an educational program); *Clevenger v. Oak Ridge School Board*, 744 F.2d 514 (6th Cir. 1984), 1984-85 EHLR 556:213 (emotionally disturbed 19-year-old with oppositional behavior, whose main problem was his inability to cooperate with authority, required a placement that would address this need). *But see, Metropolitan Government of Nashville and Davidson County v. Tennessee Department of Education*, 771 S.W.2d 427 (Tenn. Ct. App. 1989), 15 EHLR 441:450 (handicapped child not entitled to educational placement at psychiatric facility where placement was for medical reasons rather than for educational purposes).

See also, chapter 13 of this text, *supra*, for a discussion of the integrated education philosophy and its view that the benefits of being in a mainstreamed environment outweigh the benefits from an intensive, more restrictive placement.

[37] 20 U.S.C.A. §1401(a)(18)(B) (1990).

[38] 458 U.S. at 200-01, 102 S. Ct. at 3047-48, 1981-82 EHLR at 553:667.

[39] This concept is to be distinguished from the doctrine of pendent state jurisdiction. In *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S. Ct. 900 (1984), 1983-84 EHLR 555:327 (Pennhurst II), the court explained that federal courts are not courts of general jurisdiction, meaning that not every person is entitled to have access to federal court for every purpose. Various federal statutes, as well as the U.S. Constitution, set forth the nature of matters that may be heard by the federal judiciary. Over the years, a legal doctrine called pendent jurisdiction has evolved. Pendent jurisdiction permits claims that would otherwise not be cognizable in federal court to be heard by the federal court when such matter shares a common nucleus of operative fact with a federal claim that is within the court's jurisdiction.

Pennhurst interpreted the Eleventh Amendment to the Constitution, which enforced the doctrine of sovereign immunity of states. The Court in *Pennhurst* held that a state may not be sued in federal court

A state standard that is weaker than the federal requirement must step aside in favor of the basic floor of opportunity guaranteed by the Act. On the other hand, when a state standard is more stringent or demanding than the minimum requirements of the EAHCA, the state standard will be applied.[40] The actualization of a higher state standard may assist the parents in some factual circumstances,[41] while in certain limited circumstances it may support the position of the educational officials.[42] In either event, the higher state standard is presumably intended to benefit the handicapped child.

D. Cost

The Act mandates that special education and related services be provided to handicapped children without charge.[43] Governmental officials have nonetheless sometimes attempted to create exceptions to this requirement, generally to no

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without the state's consent. The Court further held that state law claims may not be asserted, via pendent jurisdiction, against states in federal court without the state's consent.

Pendent jurisdiction is not an issue in EAHCA cases, however. The inclusion of state standards in the definition of a FAPE in the Act incorporates those state standards by reference; in effect, therefore, the state standards become part of the federal law. Thus, assertion of a state educational standard may be made under the EAHCA and a party need not rely upon pendent jurisdiction to assert an action under the state standards in a federal court.

[40] *See, e.g., Board of Education of the East Windsor Regional School District v. Diamond*, 808 F.2d 987 (3d Cir. 1986), 1986-87 EHLR 558:218 (court applied the New Jersey regulatory standard "according to how the pupil can best achieve educational success"); *Geis v. Board of Education of Parsippany-Troy Hills*, 774 F.2d 575 (3d Cir. 1985), 1985-86 EHLR 557:135 (same); *David D. v. Dartmouth School Committee*, 775 F.2d 411 (1st Cir. 1985), 1985-86 EHLR 557:141 (court enforced the higher Massachusetts standard of "maximum possible development"); *Barwacz v. Michigan Department of Education*, 674 F. Supp. 1296 (W.D. Mich. 1987), 1987-88 EHLR 559:346 (court applied the higher standard of the Michigan Special Education Act requiring "special education programs and services designed to develop the maximum potential of each handicapped person").

But see, Scituate School Committee v. Robert B., 620 F. Supp. 1224 (D.R.I 1985), 1985-86 EHLR 557:207 (although the Rhode Island statute called for "special education that would best satisfy the needs of the handicapped child," the court interpreted this as requiring application of the same standard required under the EAHCA because the state statute predated the EAHCA by decades).

[41] *See, e.g., Geis v. Board of Education of Parsippany-Troy Hills*, 774 F.2d 575 (3d Cir. 1985), 1985-86 EHLR 557:135; *David D. v. Dartmouth School Committee*, 775 F.2d 411 (1st Cir. 1985), 1985-86 EHLR 557:141; *Barwacz v. Michigan Department of Education*, 674 F. Supp. 1296 (W.D. Mich. 1987), 1987-88 EHLR 559:346.

[42] *See, e.g., Schimmel v. Spillane*, 819 F.2d 477 (4th Cir. 1987), 1986-87 EHLR 558:331 (private out-of-state school was required to have approval of SEA as a school for placement of handicapped children in order to meet state standards; parent not entitled to reimbursement for unilateral placement). For discussion of reimbursement for a unilateral placement at an SEA unapproved school, *see* chapter 17, section II of this text, *infra*.

[43] 20 U.S.C.A. §1401(a)(18)(A) (1990).

avail.[44] Disputes have also arisen when school districts have attempted to obtain payments from parents' private insurance carriers or other third-party payors.[45]

Even though it is clear that parents may not be charged for educational services provided to their handicapped children, a significant fiscal issue still remains as to whether educational officials may consider cost as a factor when making a placement decision. The case law is mixed with respect to this issue. One court recognized that educational officials were confronted with limited financial resources, but made that statement when noting that the LEA was required to provide the child with only an appropriate education and not with the best possible education.[46] Since the less expensive alternative was offered by the LEA, and the court found the less expensive alternative to be appropriate, the significance of the reference to financial resources is unclear.

Two federal courts of appeal have indicated that cost is a permissible factor to be considered when determining a handicapped child's placement.[47] In the more well-known of these two cases, *A.W. v. Northwest R-1 School District*,[48] the court clearly stated that cost may be considered in the decisionmaking process. The Eighth Circuit, in rendering its opinion in *A.W.*, relied upon *Roncker v. Walter*,[49] a

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[44] *See, e.g., Parks v. Pavkovic*, 753 F.2d 1397 (7th Cir. 1985), 1984-85 EHLR 556: 372 (parents of autistic, mentally retarded child cannot be required to pay part of cost-of-living expenses of child's placement in private care facility); *Stacey G. v. Pasadena Independent School District*, 547 F. Supp. 61 (S.D. Tex. 1982), 1982-83 EHLR 554:206 (since placement was formerly paid for by parents' funds and insurance, which became exhausted, LEA required to pay for placement because it was unable to provide the required twelve-month program), *vac. and remanded on other grounds*, 695 F.2d 949 (5th Cir. 1983), 1982-83 EHLR 554:296; *Jenkins v. Florida*, 1984-85 EHLR 556:471 (M.D. Fla. 1985) (SEA violated EAHCA in charging parents for maintenance fees for residential placements), *vac. and remanded on other grounds*, 815 F.2d 629 (11th Cir. 1987), 1986-87 EHLR 558:342; *Mahoney v. Administrative School District No. 1*, 601 P.2d 826 (Or. App. 1979), 1979-80 EHLR 551:532 (LEA required to pay entire tuition cost of year-round program at private residential placement).

[45] This topic is addressed in chapter 15 of this text, *supra*.

[46] *Department of Education, State of Hawaii v. Katherine D.* 727 F.2d 809 (9th Cir. 1984), 1983-84 EHLR 555:276. The court held that an offer of emergency house services for a child in need of periodic medication, suctioning of lungs and re-insertion of tracheostomy tube was sufficient to provide a FAPE, even though this configuration of services may not have constituted the best placement for the child.

[47] *A.W. v. Northwest R-1 School District*, 813 F.2d 158 (8th Cir. 1987), 1986-87 EHLR 558:294, *cert. denied*, 484 U.S. 847 (1987) (when deciding between a residential placement and school district placement, the LEA can consider the cost of hiring a certified teacher when such hiring expense would directly reduce educational benefits provided to other handicapped students); *Doe v. Anrig*, 692 F.2d 800 (1st Cir. 1982), 1982-83 EHLR 554:271, *overruled on other grounds, Doe v. Brookline School Committee*, 722 F.2d 910 (1st Cir. 1983), 1983-84 EHLR 555:268 (reality of limited public monies must be considered when reviewing placement decisions).

[48] 813 F.2d 158 (8th Cir. 1987), 1986-87 EHLR 558:294.

[49] 700 F.2d 1058 (6th Cir. 1983), 1982-83 EHLR 554:381, *cert. denied, Cincinnati City School District Board of Education v. Roncker*, 464 U.S. 864 (1983).

Sixth Circuit decision. *Roncker*, however, is one of two Sixth Circuit decisions[50] that appear to have been clarified by a later Sixth Circuit decision, *Clevenger v. Oak Ridge School Board.*[51] *Clevenger* involved a dispute concerning which of two alternative institutional placements should be provided for an emotionally disturbed 19-year-old student. The Sixth Circuit stated in *Clevenger* that only one of those placements was appropriate. While acknowledging that cost may be considered, the Sixth Circuit emphasized that such fiscal consideration is relevant only when deciding among *alternative appropriate* placements. Since in *Clevenger* there was only one appropriate placement, cost was not a permissible factor. In the authors' view, if cost is permitted to be considered when determining the placement to be provided for a handicapped child, the *Clevenger* approach is the one most consistent with the Act. The EAHCA is clear in requiring that each handicapped child be provided an appropriate education. Thus, cost should not inhibit the provision of a FAPE if the result would be to place a handicapped child in an inappropriate program.[52]

E. Extended School Year

The traditional school year continues for approximately ten months or 180 days. Several cases have addressed the issue of whether this time limitation must be extended for handicapped children who would benefit from a longer school year; most, if not all, of the courts have answered that question affirmatively.[53]

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[50] *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983), 1982-83 EHLR 554:381, *cert. denied*, *Cincinnati City School District Board of Education v. Roncker*, 464 U.S. 864 (1983); *Age v. Bullitt County Public Schools*, 673 F.2d 141 (6th Cir. 1982), 1981-82 EHLR 553:556.

[51] 744 F.2d 514 (6th Cir. 1984), 1984-85 EHLR 556:213.

[52] *See, e.g.*, *Yaris v. Special School District of St. Louis County*, 558 F. Supp. 545 (E.D. Mo. 1983), 1982-83 EHLR 554:389, *aff'd*, 728 F.2d 1055 (8th Cir. 1984), 1983-84 EHLR 555:394 (scarcity of state funds cannot be used to deny considering educational needs of handicapped children to program in excess of the 180-day school year).

[53] *See, e.g.*, *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986), 1985-86 557:315 (summer programming must be provided to address child's regression/recoupment tendencies); *Georgia A.R.C v. McDaniel*, 740 F.2d 902 (11th Cir. 1984), 1984-85 EHLR 556:187, *adopting and reaffirming* 716 F.2d 1565 (11th Cir. 1983), 1983-84 EHLR 555:251 (state policy limiting education to 180 days per year prohibits individual consideration of needs and precludes development of IEPs that are reasonably calculated to enable students to receive educational benefits under the EAHCA); *Yaris v. Special School District of St. Louis County*, 728 F.2d 1055 (1984), 1983-84 EHLR 555:394 (state policy violates the EAHCA where it precludes consideration of the needs of handicapped children for extended and summer programs); *Crawford v. Pittman*, 708 F.2d 1028 (5th Cir. 1983), 1983-84 EHLR 555:107 (state policy limiting education to 180 days per year violates the procedural and substantive rights of handicapped children under the EAHCA); *Battle v. Commonwealth*, 629 F.2d 269 (3d Cir. 1980), 1979-80 EHLR 551:647, *cert. denied*, 452 U.S. 1109, (1981) (inflexible policy of refusing to provide more than 180 days of education is incompatible with the EAHCA's emphasis on individualization); *Bucks County Public Schools Intermediate Unit No. 22 v. Pennsylvania*, 1987-88 EHLR 559:153 (Commonwealth Ct. Pa. 1987) (despite adequate academic performance, the court will consider regression in non-academic areas for an emotionally disturbed

Some courts have based their rulings upon the inflexibility of the 180-day rule and its conflict with the Act's mandate to individualize when determining an appropriate education for each handicapped child.[54] Other courts have based their decisions upon a determination that the child in question has a so-called regression-recoupment problem.[55] This problem occurs when: (1) a child suffers an inordinate or disproportionate degree of regression during that portion of the calendar year in which the 180-day school year is not in session, and (2) it takes an inordinate or unacceptable length of time for the child to recoup those skills that have been lost. Accordingly, the child requires more than the 180-day school year in order to avoid the regression-recoupment problem. This analysis has also been applied to non-academic areas, such as those involving emotional, behavioral and social concerns.[56]

III. Least Restrictive Environment

The term *least restrictive environment* (LRE) does not appear in the EAHCA. The LRE *principle*, however, as stated in the Act, does. That principle requires that

> [T]o the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such

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child in determining whether the child should receive programming over the summer); *Stacey G. v. Pasadena Independent School District*, 547 F. Supp. 61 (S.D. Tex. 1982), 1982-83 EHLR 554:206 *vac. and remanded on other grounds* 695 F.2d 949 (5th Cir. 1983), 1982-83 EHLR 55 .296 (where a child would regress if structured program not maintained continuously throughout the year, the child must receive year-round programming in order to receive a FAPE).

[54] *See, e.g., Georgia A.R.C. v. McDaniel*, 740 F.2d 902 (11th Cir. 1984), 1984-85 EHLR 556:187; *Yaris v. Special School District of St. Louis County*, 728 F.2d 1055 (1984), 1983-84 EHLR 555:394; *Crawford v. Pittman*, 708 F.2d 1028 (5th Cir. 1983), 1983-84 EHLR 555:107; *Battle v. Commonwealth*, 629 F.2d 269 (3d Cir. 1980), 1979-80 EHLR 551:647, *cert. denied*, 452 U.S. 1109 (1981).

[55] *See, e.g., Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986), 1985-86 EHLR 557:315; *Bucks County Public Schools Intermediate Unit No. 22 v. Pennsylvania*, 1987-88 EHLR 559:153 (Commonwealth Ct. Pa. 1987); *Stacey G. v. Pasadena Independent School District*, 547 F. Supp. 61, 1982-83 EHLR 554:206 (S.D. Tex. 1982), *vac. and remanded on other ground* 695 F.2d 949 (5th Cir. 1983); 1982-83 EHLR 554:296.

[56] *See, e.g., Bucks County Public Schools Intermediate Unit No. 22 v. Pennsylvania*, 1987-88 EHLR 559:153 (Commonwealth Ct. Pa. 1987) (when emotionally disturbed children are at issue, regression need not be in the academic area).

> that education and regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. . . .[57]

This LRE concept creates a presumption in favor of the integration of handicapped children. When segregation can be avoided while still providing an appropriate education for a handicapped child, the Act requires integration. Further, the more integration the better, as long as the child receives an appropriate education.

The term *mainstreaming* is used, often inappropriately, as a synonym for LRE.[58] Mainstreaming is merely one example of the application of the LRE principle. As such, it refers to the participation of handicapped children alongside and with non-handicapped children. In other words, it contemplates the involvement of handicapped children in the mainstream (or normal) environment. This may occur in an academic setting (classroom) or elsewhere, such as in the cafeteria or assembly or during intramural sports, for example.

The concept of LRE is much broader than mainstreaming. LRE favors mainstreaming for those children for whom it is appropriate, but recognizes that for some children a more restrictive placement may be necessary. Nonetheless, LRE requires that a handicapped child be placed in the least restrictive alternative that will at the same time provide an appropriate education.

In support of the LRE mandate and the FAPE requirement, the regulations promulgated pursuant to the EAHCA require that

> (a) Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.
>
> (b) The continuum required under paragraph (a) of this section must:
>
> (1) Include the alternative placements listed . . . (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and
>
> (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.[59]

Requiring the existence of a continuum of alternative placements not only helps ensure the availability of an appropriate program for each handicapped child; it provides some protection against a handicapped child being placed in a setting more restrictive than necessary because a less restrictive alternative is unavailable due to a gap in the continuum. A school district may not refuse to make an appropriately less restrictive placement by claiming that such an alternative does not exist. Any gap in the continuum of available placements must be filled by the LEA.[60]

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[57] 20 U.S.C.A. §1412(5)(B) (1990). *See also*, 34 C.F.R. §300.550(b)(1) (1988).

[58] For additional discussion of mainstreaming and LRE, *see* chapter 13 of this text, *supra*.

[59] 34 C.F.R. §300.551 (1988).

A. Interrelationship Between LRE and Appropriateness

Primary attention must be given to providing a handicapped child with a FAPE. Application of the LRE principle, although important, is secondary to ensuring appropriateness. The Act stipulates that every handicapped child be placed in the least restrictive environment "to the maximum extent *appropriate*."[61] Thus, not all children are to be educated in a regular education setting. This principle is further evidenced by the requirement that a continuum of alternatives be available—including restrictive settings—as well as by the Act's emphasis upon individualization when determining what is appropriate for each handicapped child.

Thus, when making any placement decision with respect to a handicapped child, the first criterion that must be satisfied is that the placement is appropriate (or, as stated in *Rowley*, that the placement is "reasonably calculated to enable the child to receive educational benefits").[62] As discussed earlier, a handicapped child is not entitled to the best education, but only to an appropriate education.[63] The least restrictive alternative—from among those placements that have been determined to be appropriate—is the placement that must be chosen.[64]

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[60] *See, e.g., Springdale School District No. 50 of Washington County v. Grace*, 693 F.2d 41 (8th Cir. 1982), 1982-83 EHLR 554:200 (even though the state school for the deaf would provide an appropriate program, LRE requires the school district to establish an appropriate program in the school district); *Hendricks v. Gilhool*, 709 F. Supp. 1364 (E.D. Pa. 1989), 15 EHLR 441:352 (referral by LEA of more severely handicapped children to an IEU program violated LRE because some students were thereby placed in separate and more restrictive buildings than handicapped children who were placed in regular school buildings). *See also, Mark A. v. Grant Wood Area Education Agency*, 795 F.2d 52 (8th Cir. 1986), 1985-86 EHLR 557:412 (LRE interpreted to indicate a preference for public educational placement with mainstreaming rather than private placement, even when private placement would have resulted in the education of handicapped child in the same classroom as non-handicapped children).

See also, Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983), 1982-83 EHLR 554:381, 385, *cert. denied, Cincinnati City School District Board of Education v. Roncker*, 464 U.S. 864 (1983) (stating that "cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children. . . . Cost is no defense, however, if the school district has failed to use its funds to provide a proper continuum of alternative placements for handicapped children").

An LEA's LRE responsibility may be somewhat different for extended school year (ESY) placements since the DOE recognizes that a full continuum of alternative placements is not normally available during the summer. The DOE has opined that LEAs do not have to establish public programs for the purpose of providing ESY services if there are no public programs for non-handicapped children during this time period. In that event, however, an LEA would have to purchase a private school placement—including one in a regular education setting—if that was necessary to implement the handicapped child's IEP for ESY services. OSEP Policy Letter, 16 EHLR 290 (1989). A similar approach has been adopted by the DOE for IEP placement of preschool children when there is no public school program for preschoolers. OSEP Policy Letter, 16 EHLR 739 (1990); OSEP Memorandum 89-23, 13 EHLR 202:636 (1989).

[61] 20 U.S.C.A. §1412(5)(B) (1990) (emphasis added). *See also*, 34 C.F.R. §300.550(b)(1) (1988).

There is no simple rule for LRE that can be easily applied to every handicapped child. This is because a determination of what is appropriate must be made before one can finally apply the LRE principle.[65] Accordingly, courts have ordered institutional or quite restrictive placements for some children because such placements were required to provide an appropriate education.[66] In most cases, residential or institutional placements have only been upheld or ordered where the handicapped child has suffered from a severe or profound disability.[67] As noted by one court, "for some disabled children a residential program, rather than a day program, is the only appropriate education in view of the severity of the pupil's

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[62] 458 U.S. 176, 207, 102 S. Ct. 3034, 3051 (1982), 1981-82 EHLR 553:656, 670. *See also, Springdale School District No. 50 of Washington County v. Grace*, 693 F.2d 241 (8th Cir. 1982), 1982-83 EHLR 554:200 (LEA program that would provide educational benefit for a deaf student was required to be provided in the LRE); *Visco v. School District of Pittsburgh*, 684 F. Supp. 1310 (W.D. Pa. 1988), 1987-88 EHLR 559:519 (private school for hearing-impaired children is the LRE in which two hearing-impaired children could acquire needed oral language and lip-reading skills that could not be acquired in LEA program emphasizing sign language); *Garrick B. v. Curwensville Area School District*, 669 F. Supp. 705 (M.D. Pa. 1987), 1987-88 EHLR 559:155 (placement of learning-disabled student in mixed category learning-disabled/mentally retarded class with mainstreaming is appropriate and less restrictive than placement in private school); *Matthews v. Campbell* (E.D. Va. 1979), 1979-80 EHLR 551:264 (placement of severely to profoundly mentally retarded child in residential placement does not violate LRE after lack of meaningful progress in regular educational building); *Martin v. School Board of Prince George County*, 348 S.E.2d 857 (Va. App. 1986), 1986-87 EHLR 558:129 (since child made significant progress in partially mainstreamed, special day program, LRE required such placement rather than residential placement). *See also, Manuel R. v. Ambach*, 635 F. Supp. 791 (E.D.N.Y. 1986), 1985-86 EHLR 557:311 (where professionals differed over relative benefits of mainstream program with resource room and related services versus private school placement, the child should be placed in a mainstream program since it constituted the LRE).

[63] *See* text at note 29 of this chapter, *supra*.

[64] Compare (1) *DeVries v. Fairfax County School Board*, 872 F.2d 876 (4th Cir. 1989), 15 EHLR 441:555 (autistic child was appropriately placed in vocational program since placement in neighborhood high school would involve the child's monitoring classes rather than participating in such classes); *Springdale School District No. 50 of Washington County v. Grace*, 693 F.2d 241 (8th Cir. 1982), 1982-83 EHLR 554:200 (even though state school for deaf might provide a better program, student was properly placed in LEA program); *Miller v. School Board of Fairfax County*, 15 EHLR 441:333 (E.D. Va. 1989) (placement of handicapped child for half-day at neighborhood high school and half-day at regional center for handicapped students was the least restrictive placement since a full-day program at the neighborhood high school would not meet the student's needs); *Martin v. School Board of Prince George County*, 348 S.E.2d 857 (Va. App. 1986), 1986-87 EHLR 558:129 (since child made significant progress in partially mainstreamed special day program, a residential program could not be required for him even though he might receive greater benefit in latter placement) with (2) *Grkman v. Scanlon*, 528 F. Supp. 1032 (W.D. Pa. 1981), 1981-82 EHLR 553:508, (deaf student should continue to be placed at private school for the deaf because she had made progress in that program—in school specifically designed for children for whom communication is a primary need), *on remand*, 563 F. Supp. 793 (W.D. Pa. 1983), 1983-84 EHLR 555:101. *See also, Hessler v. State Board of Education of Maryland*, 700 F.2d. 134 (4th Cir. 1983), 1982-83 EHLR 554:455 (where LEA recommended program in public school system, it did not have to consider more restrictive alternative in private school); *Thornock v. Boise Independent School District No. 1*, 1987-88 EHLR 559:486 (Sup. Ct. Idaho 1988) (handicapped child was entitled to one-on-one aide in private school mainstreamed class, rather than to placement in a self-contained class offered by LEA).

[65] The approach of looking first at the appropriate alternatives and then applying the LRE principle to those alternatives can be applied in reverse. This is the approach taken in *Daniel R. v. State Board of*

Education, 874 F.2d 1036 (5th Cir. 1989), 15 EHLR 441:433, which is discussed in greater detail in the next subsection of this chapter. Either approach (appropriateness first and LRE second, or vice-versa) will yield the same result—the least restrictive placement that is appropriate.

[66] *See, e.g., A.W. v. Northwest R-1 School District*, 813 F.2d 158 (8th Cir. 1987), 1986-87 EHLR 558:294 (child entitled to residential placement because of minimal benefit from LEA placement); *Abrahamson v. Hershman*, 1981-82 EHLR 553:515 (D. Mass. 1982), *aff'd.*, 701 F.2d. 223 (1st Cir. 1983), 1982-83 EHLR 554:403 (residential placement authorized if essential for a student to make any educational progress); *Gladys J. v. Pearland Independent School District*, 520 F. Supp. 869 (S.D. Tex. 1981), 1980-81 EHLR 552:480 (residential placement ordered for child with organic childhood schizophrenia); *North v. District of Columbia Board of Education*, 471 F. Supp. 136 (D.D.C. 1979), 1979-80 EHLR 551:157 (residential academic program at psychiatric treatment center ordered for child).

[67] *See, e.g., Drew P. v. Clarke County School District*, 877 F.2d 927 (11th Cir. 1989), 15 EHLR 441:550 (child with mental retardation and infantile autism should be placed in a residential setting to receive sufficient educational benefit); *Brown v. The Wilson County School Board*, 16 EHLR 718 (M.D. Tenn. 1990) (brain-damaged female with primary handicapping condition of emotional disturbance and secondary handicapping condition of mental retardation required behavioral treatment program at rehabilitative center to control impulsive and aggressive behavior); *Kerkam v. D.C. Board of Education*, 672 F. Supp. 519 (D.D.C. 1987), 1987-88 EHLR 559:210, *rev'd and remanded on other grounds*, 862 F.2d 884 (D.C. Cir. 1988) (severely retarded student entitled to out-of-state placement at group home with day-school placement); *Taylor v. Board of Education of the Copake-Taconic Hills Central School District*, 649 F. Supp. 1253 (N.D.N.Y. 1986), 1986-87 EHLR 558:243 (recommended placement of multihandicapped child in IEU self-contained class, rather than placement in separate facility, failed to give consideration to opinions of professionals who knew the child best); *Tolland Board of Education v. Connecticut State Board of Education*, 1984-85 EHLR 556:412 (D. Conn. 1985) (15-year-old multihandicapped child with severe social and emotional maladjustment and neurological handicaps required placement in residential program); *Gladys J. v. Pearland Independent School District*, 520 F. Supp. 869 (S.D. Tex. 1981), 1980-81 EHLR 552:480 (residential placement was appropriate for child with organic childhood schizophrenia); *Kruelle v. Biggs*, 489 F. Supp. 169 (D. Del. 1980), 1980-81 EHLR 552:141, *aff'd sub nom. Kruelle v. Newcastle County School District*, 642 F.2d. 687 (3d Cir. 1981), 1980-81 EHLR 552:350 (profoundly retarded child with cerebral palsy and history of emotional problems required placement in a residential program); *North v. District of Columbia Board of Education*, 471 F. Supp 136 (D.D.C. 1979), 1979-80 EHLR 551:157 (emotionally and learning disabled epileptic child with grand mal seizures needed placement in a residential academic program at psychiatric treatment center); *Brown v. District of Columbia Board of Education*, 1979-80 EHLR 551:101 (D.D.C. 1978) (where deaf-blind children in self-contained class required additional support services not available in regular school building, LRE did not preclude placement of students in segregated building that could meet those needs); *Matthews v. Campbell*, 1979-80 EHLR 551:264 (E.D. Va. 1979) (severely to profoundly retarded boy required placement in residential program). *See also, St. Louis Developmental Disabilities Treatment Center Parents Association v. Mallory*, 591 F. Supp. 1416 (W.D. Mo. 1984), 1984-85 EHLR 556:117, *aff'd*, 767 F.2d 518 (8th Cir. 1985), 1985-86 EHLR 557:104 (provision of separate schools and facilities for profoundly and severely handicapped children in the state was an appropriate part of the required continuum of alternative placements and did not violate the LRE principle).

disability."[68] For other handicapped children, particularly those with limited physical needs, services can be configured to enable the child to attend the regular school in the child's neighborhood.[69]

B. Applying the Proper Standard

The courts have not been consistent with respect to the proper standard to be utilized when determining whether a child is being provided an appropriate education in the LRE. One of the earlier, and oft-cited, cases to address this issue was *Roncker v. Walter*.[70] In *Roncker*, a school district recommended that Neill, a 9-year-old trainable mentally retarded (TMR) boy, be placed in a county school serving only handicapped children. Neill's parents objected to that placement because they, and some professionals, believed that Neill would benefit from contact with non-handicapped children in a regular elementary school setting. Neill's parents envisioned that such contact would occur during non-academic settings. In holding that the child should be placed in the regular elementary school, the court stated:

> The Act does not require mainstreaming in every case but its requirement that mainstreaming be provided to the *maximum* extent appropriate indicates a very strong congressional preference. . . . In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act.[71]

Roncker has been described as establishing the "portability" test. Under that test, if the particular services that make a more restrictive setting more appropriate can be transported to a less restrictive setting, such a modification is required by the LRE mandate. Not all courts will apply this test, however.

In *Daniel R. v. State Board of Education*,[72] for example, the Fifth Circuit explicitly declined to follow the portability test. Daniel was a six-year-old child with Down Syndrome who was mentally retarded and speech impaired. Daniel was placed in a prekindergarten class for half of the day and in an early childhood class (special education) for the other half of the day. The court found that Daniel required constant individual attention in the regular prekindergarten class and that the prekindergarten teacher, in order to accommodate Daniel's intellectual limitations, would have to modify her curriculum almost beyond recognition. The court also found that Daniel was receiving very little educational benefit from the prekindergarten program.

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[68] *Board of Education of the East Windsor Regional School District v. Diamond*, 808 F.2d. 987 (3d Cir. 1986), 1986-87 EHLR 558:218.

[69] *See, e.g., Thomas v. Cincinnati Board of Education*, 15 EHLR 441:517 (S.D. Ohio 1989) (child entitled to care of tracheostomy tube and feeding tube as related services in school rather than home-bound services being offered by LEA); *Espino v. Besteiro*, 520 F. Supp. 905 (S.D. Tex. 1981), 1981-82 EHLR 553:124 (multihandicapped child who could not adequately regulate his body temperature was entitled to an air-conditioned classroom rather than the air-conditioned plexiglas cubicle in classroom offered by the LEA), *rev'd and remanded on other grounds*, 1983-84 EHLR 555:145 (5th Cir. 1983).

[70] 700 F.2d. 1058 (6th Cir. 1983), 1982-83 EHLR 554:381, *cert. denied, Cincinnati City School District Board of Education v. Roncker*, 464 U.S. 864 (1983).

[71] 700 F.2d. at 1063, 1982-83 EHLR at 554:384 (emphasis in original).

[72] 874 F.2d. 1036 (5th Cir. 1989), 15 EHLR 441:433.

In declining to follow the *Roncker* test in *Daniel R.*, the Fifth Circuit stated:

> [T]he test necessitates too intrusive an inquiry into the educational policy choices that Congress deliberately left to state and local school officials. Whether a particular service feasibly can be provided in a regular or special education setting is an administrative determination that state and local school officials are far better qualified and situated than are we to make.[73]

Nonetheless, the Fifth Circuit was careful to point out that it did not require Daniel (or all other handicapped children) to perform on the same level as nonhandicapped children.[74] The court further recognized that the benefits of mainstreaming are not limited solely to academics.[75] In recognition of the strong preference in favor of mainstreaming, the Fifth Circuit applied its own two-part test for determining compliance with the mainstreaming requirement of the EAHCA:[76]

> First, we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child. . . . If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate.[77]

In *Daniel R.*, the Fifth Circuit provided further direction for lower courts to follow by setting forth several factors that, although not necessarily constituting an exhaustive listing, should be utilized in applying the court's two-part test. The court was careful to point out, however, that no single factor would be dispositive in all cases.[78] Concerning the first stage of the *Daniel R.* test, the court said the first factor to be examined is "whether the state has taken steps to accommodate the handicapped child in regular education."[79] Then, if the public agency is providing supplementary aids and services and is modifying its regular educational program, the court must examine whether the educational agency's efforts are sufficient. The question of sufficiency must be viewed in a realistic and practical manner. The court noted that "regular educational instructors [are not required] to devote all or most of their time to one handicapped child or to modify the regular educational curriculum beyond recognition."[80]

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[73] 874 F.2d. at 1046, 15 EHLR at 441:438.

[74] 874 F.2d at 1047, 15 EHLR at 441:439.

[75] 874 F.2d at 1047-48, 15 EHLR at 441:439.

[76] Although the Fifth Circuit used the term mainstreaming, it appears from the context in which the word was used that the court treated this term as synonymous with LRE. The factual situation confronted in *Daniel R.* involved the mainstreaming portion of the LRE continuum; thus the two terms (mainstreaming and LRE) are synonymous for the purposes of that case.

[77] 874 F.2d. at 1048, 15 EHLR at 441:440.

[78] *Id.*

The circuit court next examined whether the child would receive educational benefit from regular education. This task requires focusing "on the student's ability to grasp the essential elements of the regular education curriculum."[81] The inquiry must extend, however, beyond the mere academic benefits the child may receive; the court must also inquire into the child's overall educational experience, and "balanc[e] the benefits of regular and special education for each individual child."[82] Finally, the Fifth Circuit indicated that there should be some focus upon the "effect the handicapped child's presence has on the regular classroom environment and, thus, on the education that the other students are receiving."[83]

If it is determined after applying this test that education in the regular classroom cannot be satisfactorily achieved, the second prong of the *Daniel R.* test would be applied. Under that prong, the court must determine "whether the child has been mainstreamed to the maximum extent appropriate."[84] Presumably, the same factors would be applied when evaluating the appropriateness of each succeedingly more restrictive alternative. Since school districts are required to offer a continuum of services, the LEA must take intermediate steps where necessary because the absence of an appropriate alternative in the continuum cannot be used as an excuse for not providing appropriate services.[85]

The Second Circuit has followed yet a third approach in applying the concept of LRE. In *Briggs v. Board of Education of Connecticut*[86] the Second Circuit purported to apply the test established by the Supreme Court in *Rowley*.[87] In *Briggs* the school district offered a preschool program in an elementary school that only involved hearing-impaired children. The plaintiffs in *Briggs* unilaterally placed their hearing-impaired son in a private preschool that included both handicapped and non-handicapped children. The district court ordered that the parents be reimbursed for the costs of their son's private education because that court felt the child would benefit from mainstreaming. The Second Circuit, however, deferred to the educational officials (the SEA and the LEA). The Second Circuit concluded that because the court in *Rowley* held that the proper test for appropriateness is whether the placement recommended by the school district is reasonably calculated to provide educational benefit, that same test should be applied to determine whether the LRE requirement has been met.

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[79] *Id.*

[80] *Id.*

[81] 874 F.2d at 1049, 15 EHLR at 441:440.

[82] *Id.*

[83] 874 F.2d at 1049, 15 EHLR at 441:441.

[84] 874 F.2d at 1050, 15 EHLR at 441:441.

[85] *Id.*

[86] 882 F.2d. 688 (2d Cir. 1989), 15 EHLR 441:592.

[87] *See* text accompanying note 13 of this chapter, *supra*.

The Second Circuit held that the segregated placement was appropriate because it was the placement selected by the LEA, which has expertise in that area, and because the LEA had *considered* less restrictive alternatives. The Second Circuit only required the LEA to give *consideration* to the placement sought by the parents in order for the LEA's placement decision to be entitled to great deference. The *Briggs* decision stands in direct contrast with most other courts that have addressed this issue. Most courts have concluded that the *Rowley* test is not applicable to the LRE question.[88] Moreover, both the Fifth and Eighth Circuits have noted that the *Rowley* Court's analysis is ill-suited for evaluating compliance with the mainstreaming (or LRE) requirement. As the Fifth Circuit stated in *Daniel R.*,

> [T]he *Rowley* test assumes that the State has met all of the requirements of the Act, including the mainstreaming requirement. . . . The *Rowley* test thus assumes the answer to the question presented in a mainstreaming case.[89]

In the authors' view, the reasoning stated by the Fifth Circuit, and apparently relied upon by the Sixth and Eighth Circuits,[90] shows a better understanding of the intent of the LRE principle and the limitations of the *Rowley* decision. The *Briggs* decision appears to overly minimize the role of the courts in assuring the protections of the EAHCA. Not only does *Briggs* appear to mis-apply the *Rowley* appropriateness test to a situation for which it was not intended (application of the LRE principle), but *Briggs* improperly limits the role of the courts merely to determining whether educators acted arbitrarily and capriciously.[91]

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[88] *See, e.g., Daniel R. v. State Board of Education*, 874 F.2d 1036 (5th Cir. 1989), 15 EHLR 441:433; *A.W. v. Northwest R-1 School District*, 813 F.2d 158 (8th Cir. 1987), 1986-87 EHLR 558:294, *cert. denied*, 484 U.S. 847 (1987); *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983), 1982-83 EHLR 554:381, *cert. denied, Cincinnati City School District Board of Education v. Roncker*, 464 U.S. 864 (1983). As stated by the Fifth Circuit in *Daniel R.*, 874 F.2d at 1045, 15 EHLR at 441:438:

> In *Rowley*, the handicapped student was placed in a regular education class; the EHA's mainstreaming requirement was not an issue presented for the court's consideration. . . . Faced with the same issue we face today, both the Sixth and the Eighth Circuits concluded that the *Rowley* test was not intended to decide mainstreaming issues. *A.W.*, 813 F.2d. at 163; *Roncker*, 700 F.2d at 1063.

[89] 874 F.2d at 1045, 15 EHLR at 441:438.

[90] *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983), 1982-83 EHLR 554:381, *cert. denied, Cincinnati City School District Board of Education v. Roncker*, 464 U.S. 864 (1983); *A.W. v. Northwest R-1 School District*, 813 F.2d 158 (8th Cir. 1987), 1986-87 EHLR 558:294, *cert. denied*, 484 U.S. 847 (1987).

C. Proximity to Home

The regulations enacted pursuant to the EAHCA require that "[e]ach public agency shall ensure that . . . each handicapped child's educational placement . . . [i]s as close as possible to the child's home. . . ."[92] As with the other aspects of the LRE principle, however, the primary concern is to provide an appropriate education for each handicapped child. Thus, if the neighborhood school cannot provide a FAPE, the LEA is not necessarily required to place the handicapped child in that neighborhood school.[93]

Moreover, the concept of placing a handicapped child as close to home as possible does not override the exercise of proper administrative discretion by school districts in utilizing resources in an efficient manner. School districts may permissibly concentrate resources at particular schools for particular needs and disabilities.[94]

IV. Related Services

Related services are defined in the Act as:

> [T]ransportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological serv-

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[91] *See* chapter 14 of this text, *supra*, for a discussion of judicial review and the EAHCA's preponderance-of-evidence standard of review.

[92] 34 C.F.R. §300.552(a)(3) (1988).

[93] *See, e.g., Miller v. School Board of Fairfax County*, 15 EHLR 441:333 (E.D. Va. 1989) (where neighborhood school could not provide a FAPE and placement at other school with a wing for handicapped students could, LRE was not violated by placement in the latter school).

[94] *See, e.g., Barnett v. Fairfax County School Board*, 721 F. Supp. 757 (E.D. Va. 1989), 15 EHLR 441:633 (school district was not required to duplicate at neighborhood school the cued speech program provided for a small number of students at centralized location); *Troutman v. School District of Greenville County South Carolina*, 1982-83 EHLR 554:487 (D.S.C. 1983) (second grade blind child in a mainstreamed program including one period per day of resource room and two periods per week of orientation and mobility training held not entitled to placement at school one mile away, rather than at the proposed placement in a school eleven miles away, where school district had chosen to concentrate its resources at the further school and placement at the nearer school would have fragmented resources and resulted in denial of services to other children); *Pinkerton v. Moye*, 509 F. Supp. 107 (W.D. Va. 1981), 1982-83 EHLR 554:291 (child placed in self-contained class in neighboring school district not entitled to similar class in neighborhood school, where it would be costly to decentralize locations due to limited number of children for whom placement in such class was appropriate).

> ices, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.[95]

The regulations enacted under the EAHCA, in addition to repeating the language in the statute, list as additional related services "school health services, social work services in schools, and parent counseling and training."[96] Despite this extensive rendition, the listing is not intended to be exhaustive. Related services may also include "other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music, and dance therapy). . . ."[97] Related services appear in the handicapped child's IEP and become part of the appropriate education that must be provided to the child at no cost.[98]

Regardless of whether a related service is or is not specifically listed in the Act or its regulations, it is essential that the service be related to and assist a handicapped child to benefit from special education. Thus the child who is to receive the related service must be classified as educationally handicapped. "In the absence of a handicap that requires special education, the need for what otherwise might qualify as a related service does not create an obligation under the Act."[99]

There is one exception to the requirement that a handicapped child must otherwise receive special education so as to be entitled to receive a related service. When a state defines a related service (such as occupational therapy or physical therapy) as special education, and the child is classified as educationally handicapped, that related service must be provided to the child regardless of whether the child requires other special education. In this circumstance, the therapy itself constitutes the special education.[100]

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[95] 20 U.S.C.A. §1401(a)(17) (1990).

[96] 34 C.F.R. §300.13(a) (1988). *See also*, 34 C.F.R. §300.13(b) (1988) for a definition of each of the terms listed as related services.

[97] *See* comment following 34 C.F.R. §300.13 (1988).

[98] *See, e.g., Parks v. Pavkovic*, 536 F. Supp. 296 (M.D. Ill. 1982), 1981-82 EHLR 553:610, *aff'd in part, and rev'd in part on other grounds*, 753 F.2d 1397 (7th Cir. 1985), 1984-85 EHLR 556:373 (state-imposed cost ceiling for payment for special education and related services involved in residential placement of handicapped child violates the requirement that a handicapped child be provided with a FAPE); *Gary B. v. Cronin*, 1980-81 EHLR 552:144 (N.D. Ill. 1980) (emotionally disturbed children granted preliminary injunction barring implementation of rule denying payment and reimbursement for counseling, therapy, psychological and social work services as related services).

[99] *Irving Independent School District v. Tatro*, 468 U.S. 883, 894, 104 S. Ct. 3371, 3378 (1984), 1983-84 EHLR 555:511, 516. *See also*, *Maurits v. Board of Education of Hartford County*, 1983-84 EHLR 555:364 (D. Md. 1983) (child with hemophilia not entitled to physical therapy as a related service when such therapy was not necessary for him to benefit from special education); *A.A. v. Cooperman*, 1986-87 EHLR 558:464 (Sup. Ct., A.D., N.J. 1987) (although orthopedically handicapped student who voluntarily attended private school with no special education needed transportation by individual motor vehicle with curbside drop-off and pick-up, the LEA was not required to pay for or to provide such transportation as a related service because the transportation was not required to assist the handicapped child to benefit from special education).

A. Issues Concerning Specified Related Services

Even though a service is listed in the Act or its regulations as a related service, issues of dispute may still arise. By way of example, the Act provides that medical services should be provided as related services (and thus at no cost to the family) *only when* such services serve diagnostic or evaluation purposes. Thus, disputes sometimes arise about whether a medical service is relevant to determine: (1) whether a child should be classified as handicapped (or which label of handicap should be applied to the child), or (2) what placement or services should be provided to the child. If the medical service is relevant to determining the proper classification or educational placement of a handicapped child, it is held to be a related service.[101] If the medical service is not relevant to determining the proper classification or educational placement of a handicapped child, however, it will not constitute an educationally related service since it was not used for a diagnostic or evaluation purpose.

Another area of controversy relates to the Act's inclusion of psychological services and counseling services as related services. To some degree, these terms overlap. Although the term "psychotherapy" does not appear anywhere in the statute or regulations, it has been held to be included in the definition of related services.[102] When psychotherapy is provided by a psychiatrist, however, the psychotherapy has been held to be a medical service.[103] To the converse, at least one court has opined that psychotherapy by persons other than physicians—at least for an emotionally disturbed child hospitalized in an acute-care facility—is not a related service when the purpose is primarily to address the child's medical needs.[104]

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[100] *See* EHA Policy Letter, EHLR 213:273 (1989). *See also*, *Holmes v. Sobol*, 690 F. Supp. 154 (W.D.N.Y. 1988), 1987-88 EHLR 559:463 (when ordering physical therapy over summer because of regression/recoupment problem, the court interpreted the state regulations to include the related service in the definition of special education).

[101] *See, e.g.*, *Seals v. Loftis*, 614 F. Supp. 302 (E.D. Tenn. 1985), 1985-86 EHLR 557:110 (as a result of three grand mal seizures, LEA recommended a pediatric evaluation and the pediatrician referred the child for psychological and neurological evaluations; the court held these evaluations to be related services (a neurological evaluation was a medical service for diagnostic and evaluation purposes and the psychological evaluation was a psychological service)); *Woods v. Pittman*, 1980-81 EHLR 552:442 (M.D. Mich. 1981) (payments to doctors at out-of-state private program were held to be related services because they were for diagnostic, prescriptive and evaluative services, even though the bill denominated them as medical services).

[102] *See, e.g.*, *T.G. v. Board of Education of Piscataway*, 576 F. Supp. 420 (D.N.J. 1983), 1983-84 EHLR 555:391 (psychotherapy or counseling services provided to emotionally disturbed student at special education day school by staff person with masters degree in social work held to be a related service as counseling services or psychological counseling); *Papacoda v. State of Connecticut*, 528 F. Supp. 68 (D.C. Conn. 1981), 1980-81 EHLR 552:495 (psychotherapy provided to emotionally disturbed student in out-of-state residential institution is a related psychological service); *In re Claudia K.*, 1980-81 EHLR 552:501 (19th Jud. Cir., Ill. 1981) (psychotherapy found to be related service for emotionally disturbed child who needed a residential placement); *In the matter of "A" family*, 1979-80

A third area of controversy involving specified forms of related services concerns transportation. Because transportation is a specifically listed form of related service, it has been held that an LEA must transport a handicapped child to and from school even when the school the child attends is outside the geographical boundaries of the school district.[105] Indeed, if associated with a service included in the IEP, even transportation of other family members can be considered a related service.[106] At least one court, however, has held that for transportation to be considered a related service, the need for transportation must be specifically related to the unique needs caused by the child's handicap.[107]

EHLR 551:345 (Sup. Ct. Mont. 1979) (cost of psychotherapy at out-of-state residential placement must be paid by LEA as a related service).

See also, School Committee, Town of Truro v. Commonwealth of Massachusetts, 1980-81 EHLR 552:186 (Mass. Sup. Ct. 1980) (LEA barred from changing individual psychologist who had provided psychological counseling over previous 4 1/2 years per previous IEPs; although a new program was planned, the reason for the change was financial and the individual psychologist had built up a relationship of rapport and confidence).

[103] *Max M. v. Thompson*, 592 F. Supp. 1437 (N.D. Ill. 1984), 1984-85 EHLR 556:227 (psychotherapy and similar psychological services provided by a psychologist, social worker or guidance counselor qualify as a related service, but services that can only be provided by a psychiatrist are medical services that the LEA is responsible for only if they are for diagnostic and evaluation purposes); *Darlene L. v. Illinois State Board of Education*, 1982-83 EHLR 554:532 (N.D. Ill. 1983) (child with severe behavior disorder not entitled to psychotherapy at a psychiatric hospital under the EAHCA where the state policy deems psychiatric treatment to be medical services because it is provided by a physician).

[104] *Clovis Unified School District v. California Office of Administrative Hearings*, 903 F.2d 635 (9th Cir. 1990), 16 EHLR 944.

[105] *See, e.g., Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986), 1985-86 EHLR 557:315 (LEA required to transport child one mile beyond school district boundary to caretaker during the day); *Pinkerton v. Moye*, 509 F. Supp. 107 (W.D. Va. 1981), 1982-83 EHLR 554:291 (parents entitled to reimbursement for transportation cost to self-contained class in neighboring school district).

[106] *See, e.g., Cohen v. The School Board of Dade County, Florida*, 1984-85 EHLR 556:162 (Dist. Ct. App., Fla. 1984) (LEA required to pay for up to three round trips per year to out-of-state treatment center for family of emotionally disturbed student whose IEP called for transportation and parent counseling).

[107] *McNair v. Oak Hills Local School District*, 872 F.2d 153 (6th Cir. 1989), 15 EHLR 441:381 (LEA not required to provide transportation for hearing-impaired girl placed by parents in private school for the deaf because the transportation was not necessary to address the hearing impairment). *See also, Work v. McKenzie*, 661 F. Supp. 225 (D.D.C. 1987), 1986-87 EHLR 558:431 (LEA not required to transport multihandicapped child to private, non-special education school in which parents unilaterally placed child).

B. Issues Concerning Non-Specified Related Services

A particular issue that has generated much litigation concerns services that address the physical or health condition of a child. Such disputes revolve around the question of whether the service at issue is an educationally related service or a medical-health service that does not constitute a related service under the Act.

In *Irving Independent School District v. Tatro*[108] the Supreme Court addressed the question of whether clean intermittent catheterization (CIC) was a related service. Amber Tatro was an eight-year-old girl with spina bifida who suffered from orthopedic and speech impairments and a neurogenic bladder, a condition that prevented her from emptying her bladder voluntarily. She needed to be catheterized every three to four hours to avoid injury to her kidneys. This service could be performed in a few minutes by a lay-person with minimal training. In holding CIC services to be related services, the Supreme Court opined that CIC fell squarely within the definition of a supportive service and was analogous to transportation in that it permitted Amber to remain at school during the day.[109] Care and insertion of other tubes, such as tracheostomy and gastrostomy tubes, have also been held to be related services.[110] To the converse, when attention to the physical or health needs of a handicapped child requires intensive care, these services have been held to be non-related medical services rather than educationally related services.[111]

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[108] 468 U.S. 883, 104 S. Ct. 3371 (1984), 1983-84 EHLR 555:511.

[109] *See also, Tokarcik v. Forest Hills School District*, 665 F.2d 443 (3d Cir. 1981), 1980-81 EHLR 552:513 (CIC held to be a related health service since it could be provided by a school nurse).

[110] *See, e.g., Department of Education, State of Hawaii v. Katherine D.*, 727 F.2d 809 (9th Cir. 1984), 1983-84 EHLR 555:276 (LEA required to provide intermittent care for tracheostomy to enable child to attend public school); *Macomb County Intermediate School District v. Joshua S.*, 715 F. Supp. 824 (E.D. Mich 1989), 15 EHLR 441:600 (LEA required to provide transportation, including suctioning of tracheostomy during transport, to enable child to attend school); *Thomas v. Cincinnati Board of Education*, 15 EHLR 441:517 (S.D. Ohio 1989) (tracheostomy and gastrostomy tube care is a related service).

[111] *See, e.g., Detsel v. Board of Education of Auburn Enlarged City School District*, 820 F.2d. 587 (2d Cir. 1987), 1986-87 EHLR 558:395 (full-time nursing care for respirator-dependant child was a medical rather than educationally related service); *Bevin H. v. Wright*, 666 F. Supp. 71 (W.D. Pa. 1987), 1987-88 EHLR 559:122 (intensive nursing and related health support services that were required to be provided by a nurse and that would involve life-threatening situations requiring constant vigilance were not educationally related services); *Los Gatos Joint Union High School District v. Doe*, 1984-85 EHLR 556:281 (N.D. Cal. 1984) (services provided at hospital for emotionally ill girl were not related services since hospitalization was primarily not for educational reasons).

But see, Kruelle v. New Castle County School District, 642 F.2d 687 (3d Cir. 1981), 1980-81 EHLR 552:350 (holding that multihandicapped child needing full-time assistance was entitled to a residential placement as special education services, despite LEA's claim that residential placement was to address medical and domiciliary needs).

Because of the Act's open-ended language permitting "such developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education . . ."[112] to be considered related services, each case must be addressed on an individual basis and compared to this definition. Under this approach, both residential placement[113] and summer enrichment activities[114] have been held to be related services. Moreover, the regulatory inclusion of "parent counseling and training"[115] as related services may warrant training in sign language for parents of a deaf child as support for the child's special education program.[116]

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[112] 20 U.S.C.A. §1401(a)(17) (1990).

[113] *Corbett v. Regional Center for the East Bay, Inc.*, 676 F. Supp. 964 (N.D. Cal. 1988), 1987-88 EHLR 559:373 (residential placement was held to be a related service for the student who needed a 24-hour program to address his educational, behavioral, social and developmental needs, which were inextricably intertwined).

[114] *See, e.g., Birmingham and Lamphere School Districts v. Superintendent of Public Instruction for the State of Michigan*, 1982-83 EHLR 554:318 (6th Cir. 1982) (LEA required to provide summer enrichment activities such as camping, field trips and swimming to autistic child as part of special education and related services).

[115] 34 C.F.R. §300.13 (1988).

[116] *See, e.g.*, OSEP Policy Letter, EHLR 211:399 (1986).

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Education for All Handicapped Children Act: Remedies

I. Introduction

This chapter addresses the remedies—in addition to obtaining a free appropriate public education (FAPE)—that may be available to parents of disabled children for redressing violations of the EAHCA. The first section of the chapter explains the division among the courts concerning whether damages are or are not available under the Act, and the underlying rationales for the two opposing views. The second section focuses upon the remedy of reimbursing parents who have unilaterally financed placement or services that are subsequently determined to have been required to provide their child with a FAPE. The nuances of reimbursement and its application to various circumstances are also addressed. Another section encompasses an analysis of the manner in which sovereign immunity under the Eleventh Amendment affects the availability of reimbursement, and the potential impact of pending legislation on this issue.

The next section of this chapter describes the split among the courts concerning the availability of compensatory educational services. This remedy is significant for those parents who cannot afford to "front" the expense of needed services and merely hope for later reimbursement. The complications in this area resulting from the present state of the law concerning the Eleventh Amendment are also addressed. The final section describes the availability of attorneys' fee awards to parents who prevail under the Act. In addition to issues of eligibility for such payments, factors impacting on the amount of attorneys' fees to be awarded are also discussed.

II. Damages

There has been considerable litigation concerning whether courts have the authority to award monetary damages to plaintiffs who prevail in actions brought under the EAHCA. This dispute revolves around language in the Act providing that

> [a]ny party aggrieved . . . shall have the right to bring a civil action. . . . In any [such] action . . . the court . . . shall grant such relief as the court determines is appropriate. . . .[1]

Until the Supreme Court's decision in *School Committee of the Town of Burlington v. Department of Education of Massachusetts*,[2] some courts interpreted the statutory language—"such relief as the court determines is appropriate"—as permitting an award of damages for tuition reimbursement when the court determined that the unilateral placement made by parents was necessary for a child to receive a FAPE.[3] The *Burlington* decision has since clarified the fact that while reimbursement of tuition for a properly made unilateral placement is permitted under the EAHCA, such reimbursement is not considered to constitute a form of damages.[4]

The *Burlington* case did not address the question of whether damages are an available remedy under the Act when reimbursement is not at issue. When a statute does not explicitly set forth a private remedy such as damages, the Supreme Court has held that a court must consider four questions in determining whether there is an implicit private remedy contained therein: (1) Is the plaintiff a member of a class for whose benefit the statute was enacted? (2) Does the legislative history indicate an intent to create or deny such a remedy? (3) Is such a remedy consistent with the underlying purpose of the statute? (4) Is the cause of action traditionally a matter of state law?[5] Despite this guidance, the courts have not been consistent in determining whether damages are authorized under the EAHCA.

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[1] 20 U.S.C.A. §1415(e)(2) (1990).

[2] 471 U.S. 359, 105 S. Ct. 1996 (1985), 1984-85 EHLR 556:389.

[3] *See, e.g., Monahan v. Nebraska*, 491 F. Supp. 1074 (D. Neb. 1980), 1980-81 EHLR 552:207; *Doe v. Brookline School Committee*, 722 F.2d 910 (1st Cir. 1983), 1983-84 EHLR 555:268.

[4] 471 U.S. 359, 105 S. Ct. 1996 (1985), 1984-85 EHLR 556:389. For a more detailed discussion of *Burlington* and the reimbursement principle, *see* section III of this chapter, *infra*.

[5] *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080 (1975) (whether a private remedy for damages is implicit in a statute must be determined by analyzing the four relevant factors).

The majority of courts that have considered this issue have held that damages are generally not available.[6] A minority of courts, however, have held that damages are available under the Act.[7]

The leading case holding that damages are unavailable under the EAHCA is *Anderson v. Thompson.*[8] The *Anderson* court concluded that the EAHCA does not contain an implied private right of action for damages because Congress expressly created a cause of action for other relief in the Act. According to the Seventh Circuit, the operative question "is whether damages are 'appropriate' relief."[9] To answer that question, the Seventh Circuit reviewed the legislative history and purpose of the Act—two of the four factors that are used to determine whether there is an implied right of action. The circuit court discerned no basis in the Act's legislative history to support a right to damages. The court viewed the EAHCA's sole purpose as being to provide aid to states in educating handicapped children by providing the necessary federal funds, rather than to provide compensatory damages to parents of handicapped children whose statutory rights were denied.[10] Moreover, the court concluded that a damage remedy would be inconsistent with the goals of the Act. In the Seventh Circuit's view, school districts have a need for flexibility and experimentation in programming for handicapped children that would be inhibited if school officials feared exposing themselves to monetary liability due to incorrect placements.[11]

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[6] *See, e.g., Colin K. v. Schmidt*, 715 F.2d 1 (1st Cir. 1983), 1983-84 EHLR 555:225; *Marvin H. v. Austin Independent School District*, 714 F.2d 1348 (5th Cir. 1983), 1983-84 EHLR 555:202; *Powell v. Defore*, 699 F.2d 1078 (11th Cir. 1983), 1982-83 EHLR 554:423; *Miener v. Missouri*, 673 F.2d 969 (8th Cir. 1982), 1981-82 EHLR 553:547, *cert. denied*, 459 U.S. 909 (1982); *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981), 1981-82 EHLR 553:105; *Barnett v. Fairfax County School Board*, 721 F. Supp. 757 (E.D. Va. 1989), 15 EHLR 441:633; *Hudson v. Wilson*, 1986-87 EHLR 558:186, *aff'd*, 828 F.2d 1059 (4th Cir. 1987), 1987-88 EHLR 559:139 (W.D. Va. 1986); *Wendell H. v. McDaniel*, 1984-85 EHLR 556:172 (N.D. Ga. 1984); *Parker v. District of Columbia*, 588 F. Supp. 518 (D.D.C. 1983), 1984-85 EHLR 556:191 (the EAHCA does not permit a tort claim); *Christopher N. v. McDaniel*, 569 F. Supp. 291 (N.D. Ga. 1983), 1983-84 EHLR 555:209; *Sanders v. Marquette Public Schools*, 1982-83 EHLR 554:505 (W.D. Mich. 1983); *Benner v. Negley*, 556 F. Supp. 749 (N.D. Ind. 1982), 1982-83 EHLR 554:332, *aff'd*, 725 F.2d 446 (7th Cir. 1984), 1983-84 EHLR 555:416; *Mark R. v. Board of Education*, 546 F. Supp. 1027 (N.D. Ill. 1982), 1982-83 EHLR 554:167, *aff'd*, 705 F.2d 446 (7th Cir. 1983) (claim for tort liability damages is not available under the EAHCA); *William S. v. Gill*, 536 F. Supp. 505 (N.D. Ill. 1982), 1981-82 EHLR 553:621; *Ruth Anne M. v. Alvin Independent School District*, 532 F. Supp. 460 (S.D. Tex. 1982); *Hines v. Pitt County Board of Education*, 497 F. Supp. 403 (E.D.N.C. 1980), 1980-81 EHLR 552:247; *Loughran v. Flanders*, 470 F. Supp. 110 (D. Conn. 1979), 1979-80 EHLR 551:161.

[7] *See, e.g., Jackson v. Franklin County School Board*, 806 F.2d. 623 (5th Cir. 1986), 1986-87 558:195; *Carter v. Independent School District No. 6 of Sequoyah County*, 550 F. Supp. 172 (W.D. Okla. 1981), 1982-83 EHLR 555:244; *Boxall v. Sequoia Union High School District*, 464 F. Supp. 1104 (N.D. Cal. 1979), 1979-80 EHLR 551:239.

[8] 658 F.2d. 1205 (7th Cir. 1981), 1981-82 EHLR 553:105.

[9] 658 F.2d. at 1210, n.7, 1981-82 EHLR at 553:107, n.7.

[10] 658 F.2d at 1212, 1981-82 EHLR at 553:109.

[11] 658 F.2d at 1213, 1981-82 EHLR at 553:110.

Although the *Anderson* court found damages generally unavailable under the EAHCA, it nonetheless opined that a damage remedy might be appropriate in exceptional circumstances.[12] An example of such an exceptional circumstance—as stated by the *Anderson* court—would be a situation in which a local education agency (LEA) acted in bad faith in failing to comply with the procedural safeguards of the EAHCA.[13] Several courts have followed the lead of *Anderson* in holding that although damages are generally unavailable under the Act, they are available in exceptional circumstances.[14] Furthermore, other courts have held that a violation of the Act's procedural safeguards can form the basis for an award of damages under other civil rights legislation[15] or as a direct violation of the U.S. Constitititution.[16]

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[12] *Id.*

[13] The *Anderson* court gave a second example of exceptional circumstances involving reimbursement to parents for services obtained at parental expense when such services are necessary to maintain a child's health. The *Burlington* decision has subsequently made it clear that such reimbursement is available not only when a child's health is at issue, but also whenever it is ultimately determined that such services should have been provided by the LEA in order to provide a FAPE.

[14] *See, e.g., Marvin H. v. Boston Independent School District*, 714 F.2d 1348 (5th Cir. 1983), 1983-84 EHLR 555:202 (compensatory damages are unavailable when LEA acts in good faith and complies with legal procedures); *Powell v. Defore*, 699 F.2d 1078 (11th Cir. 1983), 1982-83 EHLR 554:423 (damages are available in exceptional circumstances, which did not exist in this case); *Hudson v. Wilson*, 1986-87 EHLR 558:186 (W.D. Va. 1986), *aff'd*, 828 F.2d 1059 (4th Cir. 1987), 1987-88 EHLR 559:139 (damages are not available under EAHCA absent bad faith by LEA); *Wendell H. v. McDaniel*, 1984-85 EHLR 556:172 (N.D. Ga. 1984) (damages are available in exceptional circumstances, which did not exist in this case); *Christopher N. v. McDaniel*, 569 F. Supp. 291 (N.D. Ga. 1983), 1983-84 EHLR 555:209 (same); *Ruth Anne M. v. Alvin Independent School District*, 532 F. Supp. 460 (S.D. Tex. 1982), 1981-82 EHLR 553:565 (damages would be available if parents prove a unilateral placement was necessary to protect child's physical health and to receive services that should have been provided, or if parents show defendants acted in bad faith). *See also, Mountain View-Los Altos Union High School District v. Sharron B.H.*, 709 F.2d 28 (9th Cir. 1983), 1983-84 EHLR 555:113 (where, in a pre-*Burlington* case the court, in denying reimbursement, stated its agreement with the reasoning in *Anderson*); *Hurry v. Jones*, 734 F.2d 879 (1st Cir. 1984), 1983-84 EHLR 555:543 (vacating a district court damage award for personal suffering due to a finding of bad faith, but permitting reimbursement for interim educational and related expenses even when there are no special circumstances).

[15] *See, e.g., Mrs. W. v. Tirozzi*, 832 F.2d 748 (2d Cir. 1987), 1987-88 EHLR 559:184 (parents entitled to bring an action under 42 U.S.C. §1983 based on the EAHCA claiming a violation of the Due Process and Equal Protection clauses of the federal Constitution); *Board of Education of East Windsor Regional School v. Diamond*, 808 F.2d 987 (3d Cir. 1986), 1986-87 EHLR 558:218 (Section 1983 action permitted based upon alleged violation of the EAHCA); *Quackenbush v. Johnson City School District*, 716 F.2d 141 (2d Cir. 1983), 1983-84 EHLR 555:151 (an LEA's denial of access to procedural safeguards under the EAHCA may permit an award of damages under Section 1983).

[16] *See, e.g., Begay v. Hodel*, 16 EHLR 585 (D. Ariz. 1990), (physically disabled woman permitted to pursue personal injury action under the Due Process and Equal Protection clauses of the federal constitution against the Bureau of Indian Affairs based upon alleged denial of rights granted by the EAHCA).

The seminal case holding that damages are available under the EAHCA is *Boxall v. Sequoia Union High School District.*[17] In so ruling, the *Boxall* court relied upon the joint Senate-House conference that agreed upon the language to be included in the EAHCA. The conference committee report provides that

> [s]uch action may be brought in any state court of competent jurisdiction or in any district court of the United States and in any such action the court . . . shall make an independent decision . . . and *shall grant all appropriate relief.*[18]

The *Boxall* court opined that the conference committee language "suggests very strongly that, when appropriate, compensatory damages may be awarded."[19]

Even in those jurisdictions in which damages have been held available under the EAHCA, however, such damages must be capable of reasonable determination. In *Campbell v. Talledega County Board of Education,*[20] for example, the court denied damages to a severely handicapped child because it concluded that damages could not be reasonably ascertained. The court found that it would be impossible to determine the extent of injury attributable to the time period before the family moved into their present school district—the period in which the court found much of the child's injury to have occurred—in order to determine the remaining extent of injury attributable to the later actions of the present school district.

III. Reimbursement

In *School Committee of the Town of Burlington v. Department of Education of Massachusetts*[21] the Supreme Court held that parents are entitled to reimbursement for expenses incurred for a unilateral placement that is ultimately determined to have been necessary to provide a FAPE for their handicapped child. In that case, the school district recommended placement of a handicapped child in a highly structured class within the school district. Relying upon evaluations from outside experts, the parents wanted the child placed in a state-approved special education private school. Since the LEA and parents were unable to agree, the parents unilaterally placed their child in the private placement and sought reimbursement from the LEA. The LEA opposed the parents' action on two grounds:

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[17] 464 F. Supp. 1104 (N.D. Cal. 1979), 1979-80 EHLR 551:239.

[18] Joint explanatory statement of the committee of conference, in S. Conf. Rep. No. 455, 94th Cong. 1st Sess. 50, reprinted in *U.S. Code Cong. and Admin. News*, 1425, 1503 (1975) (emphasis added).

[19] 464 F. Supp. at 1112, 1979-80 EHLR at 551:243.

[20] 518 F. Supp. 47 (N.D. Ala. 1981), 1980-81 EHLR 552:472.

[21] 471 U.S. 359, 105 S. Ct. 1996 (1985), 1984-85 EHLR 556:389.

(1) reimbursement is not available under the EAHCA; and (2) the Act's stay-put requirement[22] bars reimbursement.

With respect to the first defense, the Supreme Court concluded that the statutory language calling for a court to "grant such relief as [it] determines is appropriate"[23] should be given its ordinary meaning, and thus the language "confers broad discretion on the court."[24] This conclusion was influenced by the Court's perceptive understanding of the practicalities of implementation of the procedural guarantees under the Act. The Court stated:

> A final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed . . . .[I]t would be an empty victory to have a court tell [parents] several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials.[25]

In ruling that reimbursement is available to prevailing parents, however, the Court clarified that such reimbursement does not constitute damages, *per se*, but "merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP."[26]

The Court easily disposed of the LEA's second defense—that the parents' unilateral placement violated the stay-put requirement and thus rendered the parents ineligible for reimbursement. The Court indicated that the stay-put provision says nothing about financial responsibility or reimbursement.[27] The Court nonetheless pointed out that "parents who unilaterally change their child's placement during the pendency of review proceedings without the consent of state or local school officials do so at their own financial risk."[28] Parents who thus do not prevail in a claim that the school district's proffered placement was not appropriate will be forced to bear the expenses of their unilateral action.[29]

While making it clear that reimbursement is available as a remedy under the Act, the Court left open the question of whether reimbursement must be awarded in every instance in which parents prevail:

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[22] 20 U.S.C.A. §1415(e)(3) (1990) (*see* chapter 14 of this text, *supra*, for a discussion of the stay-put requirement).

[23] 20 U.S.C.A. §1415(e)(2) (1990).

[24] 471 U.S. at 369, 105 S. Ct. at 2002, 1984-85 EHLR at 556:393.

[25] 471 U.S. at 370, 105 S. Ct. at 2002, 1984-85 EHLR at 556:394.

[26] 471 U.S. at 370-71, 105 S. Ct. at 2002-03, 1984-85 EHLR at 556:394.

[27] 471 U.S. 359, 372, 105 S. Ct. 1996, 2004, 1984-85 EHLR 556:389, 395.

[28] 471 U.S. at 373-74, 105 S. Ct. 2004, 1984-85 EHLR 556:395.

[29] *See, e.g., Cain v. Yukon Public Schools*, 775 F.2d 15 (10th Cir. 1985), 1985-86 EHLR 557:174; *Scituate School Committee v. Robert B.*, 620 F. Supp. 1224 (D.R.I. 1985), 1985-86 EHLR 557:207, *aff'd*, 795 F.2d 77 (1st Cir. 1986).

> We do think that [the Court of Appeals] was correct in concluding that "such relief as the court determines is appropriate," within the meaning of §1415(e)(2), means that equitable considerations are relevant in fashioning relief.[30]

Thus, even when the LEA has failed to offer a FAPE, the equities should be considered by a court before automatically awarding full reimbursement.[31]

One application of the equity principle has resulted in reimbursement being limited to the period after the parents notified the school district of their dissatisfaction with the proposed IEP.[32] Further, in order for parents to tip the equity balance in their favor, they may need to investigate other potential alternatives before making a unilateral placement.[33] Courts may also sometimes tip the balance against a party they perceive to have delayed or impeded the process of placement.[34] Delay by parents after a difference of opinion has surfaced and testing is completed, however, should not be a factor in the court's determination, at least when such delay causes no injury to the LEA. For example, parents' responsibility for delaying a due process hearing should not affect the balancing process because, if the parents prevail, the cost to the LEA will be the same as it would have been had there been no disagreement or delay in the first place.[35]

The expenses for which parents are entitled to reimbursement presumably include all those necessary to enable the handicapped child to receive a FAPE. A variety of expenses have been ordered to be reimbursed, including tuition expense,[36] costs of residential placement,[37] expenses for related services,[38] expenses for other services required to permit a student to receive a FAPE,[39] lost earnings by a parent for time expended relating to protecting the child's rights,[40] and even interest on payments made for a unilateral placement or interest on borrowings in order to make such payments.[41] The balancing of equities can also result in neither party gaining a total victory, but rather in the court imposing a Solomon-like decision concerning who shall bear the costs.[42]

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[30] 471 U.S. at 374, 105 S. Ct. at 2005, 1984-85 EHLR at 556:396.

[31] *See, e.g., Jenkins v. State of Florida*, 815 F.2d 629 (11th Cir. 1987), 1986-87 EHLR 558:342 (when determining whether to provide reimbursement, a court should balance the equities); *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986), 1985-86 EHLR 557:315 (when considering whether reimbursement is appropriate, the elements a court should consider include the availability of other suitable placements, the efforts of the parent to secure alternatives and the degree of LEA cooperation).

[32] *See, e.g., Garland Independent School District v. Wilks*, 657 F. Supp. 1163 (N.D. Tex. 1987), 1986-87 EHLR 558:308 (reimbursement was available for supplemental services after the parents notified LEA of dissatisfaction with IEP).

[33] *See, e.g., Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986), 1985-86 EHLR 557:315 (elements to consider in determining the amount of reimbursement include the efforts of parents to secure alternatives); *B.G. by F.G. v. Cranford Board of Education*, 702 F. Supp. 1140 (D.N.J. 1988), 15 EHLR 441:327, supplemented 702 F. Supp. 1158 (D.N.J. 1988) (even though the proposed IEP was inappropriate, reimbursement for psychotherapy was not awarded in part because the parents made minimal efforts to find alternatives).

[34] *See, e.g., Hudson v. Wilson*, 828 F.2d 1059 (4th Cir. 1987), 1987-88 EHLR 559:139 (equities favor parent due in part to LEA's being dilatory in testing); *Hunter v. Seattle School District No. 1*, 1986-87 EHLR 558:302 (Ct. App. Wash. 1987) (parents not entitled to reimbursement where LEA not given opportunity to assess child's needs because student was unilaterally placed out of state and not returned home to enable evaluation).

[35] *See, e.g., Eugene B. v. Great Neck Union Free School District*, 635 F. Supp. 753 (E.D.N.Y. 1986), 1985-86 EHLR 557:420.

The courts are not in agreement over the question of whether parents are entitled to reimbursement for expenses of a placement that is at an unapproved school. While some courts have held that reimbursement is not available in such instances,[43] others have ruled that reimbursement is available.[44]

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[36] *See, e.g., Thornock v. Boise Independent School District No. 1*, 1987-88 EHLR 559:486 (Sup. Ct. Idaho 1988); *Board of Education of County of Cabell v. Dienelt*, 1986-87 EHLR 558:305 (S.D. W. Va. 1987), *aff'd*, 843 F.2d 813 (4th Cir. 1988), 1987-88 EHLR 559:461; *Fallon v. Board of Education of Scotch Plains-Fanwood*, 1982-83 EHLR 554:144 (Super. Ct. N.J. 1982).

[37] *See, e.g., Drew P. v. Clarke County School District*, 877 F.2d 927 (11th Cir. 1989), 15 EHLR 441:550; *Brown v. Wilson County School Board*, 16 EHLR 718 (M.D. Tenn. 1990), *Gillette v. Fairland Board of Education*, 725 F. Supp. 343 (S.D. Ohio 1989), 16 EHLR 285.

[38] *See, e.g., Rapid City School District v. Vahle*, 735 F. Supp. 1364 (D.S.D. 1990), 16 EHLR 638 (reimbursement for occupational therapy to address sensory integration problems); *Max M. v. Illinois State Board of Education*, 629 F. Supp. 1504 (N.D. Ill. 1986), 1986-87 EHLR 558:108 (reimbursement for psychotherapy). *See also*, OSEP Policy Letter, EHLR 211:419 (1986) (since handicapped child required a special diet as a related service, dietary services were reimbursable).

[39] *See, e.g., Thornock v. Boise Independent School District No. 1*, 1987-88 EHLR 559:486 (Sup. Ct. Idaho 1988) (court ordered reimbursement for personal aide).

[40] *See, e.g., Board of Education of the County of Cabell v. Dienelt*, 1986-87 EHLR 558:305 (S.D. W. Va. 1987), *aff'd*, 843 F.2d 813 (4th Cir. 1988), 1987-88 EHLR 559:461.

[41] *See, e.g., Fallon v. Board of Education of Scotch Plains-Fanwood*, 1982-83 EHLR 554:144 (Super. Ct. N.J. 1982) (parents awarded pre-judgement interest on payments for tuition and transportation for unilateral placement); *Board of Education of County of Cabell v. Dienelt*, 1986-87 EHLR 558:305 (S.D. W. Va. 1987), *aff'd*, 843 F.2d 813 (4th Cir. 1988), 1987-88 EHLR 559:461 (reimbursement granted for interest on money borrowed to finance unilateral placement).

[42] *See, e.g., Lascari v. Ramapo Indian Hills Regional High School District*, 15 EHLR 441:565 (N.J. Sup. Ct. 1989) (based on the equities, parents were entitled to reimbursement for tuition but not for room and board expenses at out-of-state residential school).

[43] *See, e.g., Tucker v. Bay Shore Union Free School District*, 873 F.2d. 563 (2d Cir. 1989), 15 EHLR 441:429 (reimbursement for non-approved school is unavailable due to non-conformance with state standards); *Antkowiak v. Ambach*, 838 F.2d 635 (2d Cir. 1988), 1987-88 EHLR 559:275 (same); *Schimmel v. Spillane*, 819 F.2d 477 (4th Cir. 1987), 1986-87 EHLR 558:331 (same); *Hiller v. Board of Education of the Brunswick Central School District*, 687 F. Supp. 735 (N.D.N.Y. 1988), 15 EHLR 441:194 (same); *Taglianetti v. Cronin*, 1985-86 EHLR 557:417 (App. Ct. Ill. 1986) (LEA not responsible for cost of non-approved private school unless exceptional circumstances exist, which did not in this case).

[44] *See, e.g., Kerkam v. District of Columbia Board of Education*, 672 F. Supp. 519 (D.D.C. 1987), 1987-88 EHLR 559:210, *rev'd and remanded on other grounds*, 862 F.2d 884 (D.C. Cir. 1988)

Moreover, two procedural issues have arisen in the wake of *Burlington*. The first concerns the time frame for which reimbursement may be appropriate. It has been held that an LEA must reimburse parents only for expenses incurred during the time in which their child resided in the school district—and not for any time period during which the family lived elsewhere.[45] The second issue pertains to the authority of hearing officers to award reimbursement. Although some states have not provided such authority to hearing officers, it has been held that federal law supersedes state law and requires that the hearing officer be given that authority.[46]

IV. Sovereign Immunity

The Supreme Court unequivocally held in *Dellmuth v. Muth*[47] that reimbursement against a *state* is barred by the Eleventh Amendment.[48] The district court in *Muth* had held the LEA and the state jointly and severally liable for reimbursement to the parents of a handicapped child because procedural flaws had delayed the administrative process, even though the district court determined that the proposed IEP had been appropriate. The Supreme Court did not allow that ruling to stand.

The *Muth* case was not the first time the Supreme Court had addressed the question of the application of the Eleventh Amendment to federal civil rights legislation. In *Atascadero State Hospital v. Scanlon*[49] the Supreme Court stated:

(since the proposed placement by LEA was insufficient, and since there was no comparable placement available in the school district, reimbursement was available for placement at unapproved group home and combined day-school placement out of district); *Carrington v. Commissioner of Education*, 535 N.E. 2d 212 (Sup. Judic. Ct. Mass. 1989), 15 EHLR 441:373 (reimbursement was available for cost of non-approved placement in Arizona; question of appropriateness is separate from issues related to whether a placement is on the approved list).

[45] *See, e.g., Gerasimou v. Ambach*, 636 F. Supp. 1504 (E.D.N.Y. 1986), 1986-87 EHLR 558:101 (reimbursement is not available for the period of time in which the family no longer continues to reside in the LEA).

[46] *See, e.g., S-1 v. Spangler*, 650 F. Supp. 1427 (M.D.N.C. 1986), 1986-87 EHLR 558:179, *vacated and remanded on other grounds*, 832 F.2d 294 (4th Cir. 1987), 1987-88 EHLR 559:266 (independent hearing officer can award reimbursement, even if state law is to the contrary). *See also*, OSERS Policy Letter, EHLR 211:429A (1987) (hearing officers have the authority to determine whether parents are entitled to be reimbursed for their child's unilateral placement).

[47] 491 U.S. ______, 109 S. Ct. 2397 (1989), 15 EHLR 441:443.

[48] The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

[49] 473 U.S. 234, 105 S. Ct. 3142 (1985).

> Congress may abrogate the States' constitutionally secured immunity from suit in Federal Court only by making its intention unmistakably clear in the language of the statute.[50]

Authority for Congress to abrogate the Eleventh Amendment is granted pursuant to Section 5 of the Fourteenth Amendment, which authorizes Congress to enact legislation to enforce the due process and equal protection clauses.[51] In *Muth* the state conceded that the EAHCA was enacted pursuant to Section 5 of the Fourteenth Amendment.[52] The issue in *Muth* was whether Congress stated a clear intention in the EAHCA to abrogate the Eleventh Amendment. In answering that question in the negative, the Court stated:

> We hold that the statutory language of the [EAHCA] does not evince an unmistakably clear intention to abrogate the States' constitutionally secured immunity from suit. The 11th Amendment bars [the parents'] attempt to collect tuition reimbursement from the [state].[53]

The holding in *Muth*, however, only affects parents' ability to seek reimbursement from a state; it does not affect the ability of parents to seek reimbursement from other parties. Thus, parents may seek reimbursement from school districts. Furthermore, compensatory educational services—which are addressed in the next section of this chapter—may not be affected by the *Muth* decision.[54]

Legislation is presently pending before Congress to amend the EAHCA. The portions of the bills before the Senate and House concerning the issue of sovereign immunity are virtually identical. The House version reads as follows:

> (a) A State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of this Act.
>
> (b) In a suit against a State for a violation of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public entity other than a State.
>
> (c) The provisions of subsections (a) and (b) shall take effect with respect to violations that occur in whole or part after the date of the enactment of the Education of the Handicapped Act Amendments of 1990.[55]

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[50] 473 U.S. at 242, 105 S. Ct. at 3147.

[51] *See, e.g., Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666 (1976).

[52] 491 U.S. ______, ______, n.1, 109 S. Ct. 2397, 2400, n.1 (1989), 15 EHLR 441:443, 446, n.1.

[53] 491 U.S. at ______, 109 S. Ct. at 2398, 15 EHLR at 441:443 (footnote omitted).

[54] *See, e.g., Burr v. Sobol*, 888 F.2d 258 (2d Cir. 1989), 16 EHLR 151 (Eleventh Amendment immunity does not affect the availability of reimbursement for compensatory educational services since such services are prospective in nature and the Eleventh Amendment only bars retroactive financial impact on a State treasury); *Lester H. v. Carroll*, 16 EHLR 10 (E.D. Pa. 1989) (same).

[55] H.R. 1013, 101st Cong., 2d Sess., §102 (1990). *See also*, S. 1824, 101st Cong., 1st Sess., §3 (1989) (comparable Senate Bill).

In the event this legislation is enacted, the *Muth* decision will effectively be overruled. Its impact will continue, however, as it will still apply to violations of the Act that have not continued beyond the date of enactment of the proposed amendment.

V. Compensatory Educational Services

Compensatory educational services are designed to remedy—in whole or in part—the progress lost by a handicapped student because he or she was previously denied a FAPE. The issue of whether the EAHCA provides a right to compensatory educational services has received more attention since the Supreme Court ruled in *Burlington* that reimbursement is available under the EAHCA and does not constitute damages.

The courts that have considered the issue of compensatory damages are not uniformly in agreement. The majority of these courts have held that compensatory educational services are included in the remedies available under the EAHCA.[56] In a leading case following this majority view, *Miener v. Missouri*,[57] the court explained why compensatory educational services should be available under the Act as follows:

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[56] *See, e.g.*, *Burr v. Ambach*, 863 F.2d 1071 (2d Cir. 1988), 15 EHLR 441:314, *vacated and remanded*, *Sobol v. Burr*, ______ U.S. ______, 109 S. Ct. 3209 (1989), *reaff'd*, *Burr v. Sobol*, 888 F.2d 258 (2d Cir. 1989), 16 EHLR 151 (compensatory education was available to a child beyond the age of 21 because it is analogous to reimbursement); *Jefferson County Board of Education v. Breen*, 853 F.2d 853 (11th Cir. 1988), 15 EHLR 441:184 (compensatory education was available to a child beyond the age of 21 where LEA failed for approximately four years to propose an appropriate placement); *Miener v. Missouri*, 800 F.2d 749 (8th Cir. 1986), 1986-87 EHLR 558:123 (a student denied a FAPE is entitled to compensatory educational services for the same reasons reimbursement is available); *Lester H. v. Carroll*, 16 EHLR 10 (E.D. Pa. 1989), (severely mentally retarded boy was entitled to compensatory educational services for two and one-half years beyond the age of 21 due to LEA's failure to locate a residential placement within a reasonable period of time); *Max M. v. Thompson*, 592 F. Supp 1450 (N.D. Ill. 1984), 1983-84 EHLR 555:431 (claim for compensatory and remedial services was reinstated because such services are prospective and thus available under the EAHCA); *Bennett v. District of Columbia Board of Education*, 1982-83 EHLR 554:444 (D.D.C. 1983) (although compensatory education is virtually indistinguishable from damages, it is not barred by the Eleventh Amendment [sovereign immunity] where a student's rights cannot be protected otherwise); *Campbell v. Talladega County Board of Education*, 518 F. Supp. 47 (N.D. Ala. 1981), 1980-81 EHLR 552:472 (LEA ordered to provide FAPE for two years past student's 21st birthday because LEA acted from conviction that child was capable of little progress and thus did not provide appropriate IEP); *White v. California*, 1987-88 EHLR 559:191 (3d App. Dist. Cal. 1987) (since damages are not consistent with the intent of the EAHCA, child is entitled to compensatory education services because the EAHCA grants entitlement to services). *See also*, *Martin v. School Board of Prince George County*, 1986-87 EHLR 558:129 (Va. App. 1986) (court noted that a strong argument can be advanced that if an LEA does not meet its obligations under the EAHCA, a handicapped child may be entitled to compensatory educational services; since a FAPE was provided in this case, however, the court declined to express an opinion concerning this issue); *Cronin v. Board of Education of East Ramapo Central School District*, 689 F. Supp. 197 (S.D. N.Y. 1988), 15 EHLR 441:124 (handicapped child who challenged appropriateness of graduation from high school was entitled to remain in education program during pendency of administrative proceedings).

[57] 800 F.2d 749 (8th Cir. 1986), 1986-87 EHLR 558:123.

> Like the retroactive reimbursement in *Burlington*, imposing liability for compensatory educational services on the defendants "merely requires [them]to belatedly pay expenses that [they] should have paid all along [.]" Here, as in *Burlington*, recovery is necessary to secure the child's right to a free appropriate public education. We are confident that Congress did not intend the child's entitlement to a free education to turn upon [his or] her parent's ability to "front" its costs . . . .
>
> . . . Indeed, this case may present an even more compelling claim for relief than did *Burlington*, since in *Burlington* the child had already received educational services without resort to the governmental resources devoted to that purpose, resources whose effectiveness Congress desired to promote through safeguarding them against damages claims.[58]

Aside from justifying the availability of compensatory educational services as a "poor-man's *Burlington*"—a remedy analogous to reimbursement for those parents who do not have the funds to finance a FAPE initially—at least one court has also concluded that compensatory education serves the purpose of deterring school districts from unnecessarily prolonging litigation in order to decrease potential liability.[59]

A small minority of courts have held, on the other hand, that compensatory educational services are not available under the Act.[60] One rationale proffered for this minority view is that compensatory educational services and monetary damages are similar in nature, and since monetary damages are not available under the Act neither are compensatory educational services.[61] A number of other courts espousing the minority view, however, have expressed that view only in the context of a student seeking compensatory educational services beyond the student's 21st birthday.[62] It is thus unclear whether those courts would follow the minority view if the request for compensatory educational services were for a child under the age of 21.

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[58] 800 F.2d at 753-54, 1986-87 EHLR at 558:123-26 (footnotes omitted).

[59] *Jefferson County Board of Education v. Breen*, 853 F.2d 853 (11th Cir. 1988), 15 EHLR 441:184.

[60] *See, e.g., Alexopulos v. San Francisco Unified School District*, 817 F.2d 551 (9th Cir. 1987), 1986-87 EHLR 558:411 (compensatory education is identical to monetary damages and thus unavailable under the EAHCA); *Wexler v.Westfield Board of Education*, 784 F.2d 176 (3d Cir. 1986), 1985-86 EHLR 557:283 (reimbursement and compensatory educational services are unavailable for postgraduate education for a student who has received a diploma); *Natrona County School District No. 1 v. McKnight*, 15 EHLR 441:264 (Wyo. Sup. Ct. 1988) (handicapped person is not entitled to cost of compensatory education beyond 21st birthday); *Powell v. Defore*, 1981-82 EHLR 553:293 (N.D. Ga. 1982) (child who allegedly was incorrectly placed in learning disabled self-contained class for one year was not entitled to compensation for past deficiencies); *Adams Central School District v. Deist*, 1983-84 EHLR 555:124 (Sup. Ct. Neb. 1983) and supplemental opinion, 1983-84 EHLR 555:129B (Sup. Ct. Neb. 1983) (state is not obligated to provide FAPE beyond a student's 21st birthday).

[61] *See, e.g., Alexopulos v. San Francisco Unified School District*, 817 F.2d 551 (9th Cir. 1987), 1986-87 EHLR 558:411 (compensatory education is virtually identical to monetary damages and is therefore barred by the Eleventh Amendment).

As was explained in more detail in the previous section of this chapter, the Eleventh Amendment has been held to provide a bar to obtaining *reimbursement* from a state.[63] This ruling does not automatically apply, however, to prohibit the availability of compensatory educational services. Some courts have held that compensatory educational services are significantly different from reimbursement, in that the former constitute prospective relief and thus do not come within the scope of immunity imposed by the Eleventh Amendment.[64]

In the event that the legislation pending before Congress (or similar legislation) is enacted, states will no longer be immune under the Eleventh Amendment to remedies available under the EAHCA. Accordingly, in those courts recognizing the availability of compensatory educational services, such a remedy will be available to parents regardless of whether the defendant is the state. In the event that such legislation is enacted, it is unclear what response will be forthcoming from those courts upholding the minority view that compensatory educational services are not available. Presumably, to the extent that a court previously denied compensatory educational services based upon reliance on the Eleventh Amendment, that court should look more favorably upon the availability of compensatory educational services.

VI. Attorneys' Fees

Prior to 1984, parties who prevailed under the EAHCA often sought reimbursement of attorneys' fees via Section 505 of the Rehabilitation Act of 1973[65] or in reliance upon Section 1988 of the Civil Rights Attorney's Fees Award Act.[66] In

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[62] *See, e.g., Natrona County School District No. 1 v. McKnight*, 15 EHLR 441:264 (Wyo. Sup. Ct. 1988) (student is not entitled to money for cost of compensatory education beyond 21st birthday because state Constitution limits the right to education up to a child's 21st birthday); *Adams Central School District v. Deist*, 1983-84 EHLR 555:124 (Sup. Ct. Neb. 1983) and supplemental opinion, 1983-84 EHLR 555:129B (Sup. Ct. Neb. 1983) (state is not obligated to provide a FAPE beyond a student's 21st birthday because the EAHCA limits eligibility to ages 3-21).

[63] *Dellmuth v. Muth*, 491 U.S. ______, 109 S. Ct. 2397 (1989), 15 EHLR 441:443.

[64] *See, e.g., Burr v. Sobol*, 888 F.2d 258 (2d Cir. 1989), 16 EHLR 151; *Lester H. v. Carroll*, 16 EHLR 10 (E.D. Pa. 1989) (the Eleventh Amendment is not a bar to compensatory educational services because such services constitute prospective relief); *See also, Milliken v. Bradley*, 433 U.S. 267, 97 S. Ct. 2749 (1977) (desegregation decree ordering compensatory education was prospective and therefore not barred by Eleventh Amendment); *Timms v. Metropolitan School District of Wabash County*, 722 F.2d 1310 (7th Cir. 1983) (dicta recognizing *Milliken* impacts on reasoning in *Miener* and *Anderson*).

[65] 29 U.S.C.A. §794a (West Supp. 1990).

[66] 42 U.S.C.A. §1988 (1981) provides:

> In any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985 and 1986 of this Title, Title IX of Public Law 92-318, or Title VI of the Civil

1984, however, the Supreme Court held in *Smith v. Robinson*[67] that the EAHCA provides the exclusive statutory remedy for parties who prevail under the Act. The Court opined that the EAHCA permitted neither the awarding of attorneys' fees nor a remedy of such omission by parental recourse to other federal statutes, such as Section 1988 or Section 505.[68]

In 1986 the Handicapped Children's Protection Act (HCPA),[69] which amended the EAHCA, was enacted to counteract the ruling in *Smith v. Robinson*.[70] The HCPA permits the awarding of attorneys' fees to a prevailing party under the EAHCA by providing:

> In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.[71]

The Act expressly authorizes the "court," in its discretion, to award attorneys' fees to prevailing parties. It has been held that a "hearing officer," however, lacks jurisdiction to do so.[72]

A. Awards Related to Legal Services Performed at Administrative Proceedings

The EAHCA provides that a court may award attorneys' fees to a prevailing party "in any action *or proceeding*."[73] Thus, attorneys' fees may be awarded in

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Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

[67] 468 U.S. 992, 104 S. Ct. 3457 (1984), 1983-84 EHLR 555:493.

[68] Note, however, that where express statutory language distinguishes one statute from another, the courts have adopted a relatively uniform set of principles regarding fees. *See, e.g., Hensley v. Eckerhardt*, 461 U.S. 424, 433, n.7, 103 S. Ct. 1933, 1939, n.7 (1983) ("The standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party'.").

[69] Pub. L. No. 99-372, 100 Stat. 796-98 (1986), 20 U.S.C.A. §§1415(e)(4)(B)-(F) (1990).

[70] 1986 *U.S. Code Cong. and Admin. News* 1798-99.

[71] 20 U.S.C.A. §1415(e)(4)(B) (1990).
Handicapped Indian students are not covered by the HCPA. They may be eligible for reimbursement of attorneys' fees, however, under 28 U.S.C. §2412(d)(1)(A) of the Equal Access to Justice Act. *Ramon v. Soto*, 889 F.2d 891 (9th Cir. 1989), 16 EHLR 152.

[72] *See, e.g., Mathern v. Campbell County Children's Center*, 674 F. Supp. 816 (D. Wyo. 1987), 1987-88 EHLR 559:273. *See also, Lauren T. v. Crisp County Board of Education*, 1986-87 EHLR 508:298 (SEA Ga. 1987).

[73] 20 U.S.C.A. §1415(e)(4)(B) (1990) (emphasis added).

connection with statutorily required EAHCA administrative hearings.[74] At least one court has also awarded attorneys' fees for time spent at IEP meetings.[75]

Minor controversy has arisen, however, with respect to the right of a party who prevails at the administrative level to bring an independent action in state or federal court solely for the recovery of attorneys' fees. The argument that an independent action may not be maintained solely for the recovery of attorneys' fees is based, in part, upon statutory interpretation of the Act's language limiting the awarding of attorneys' fees to an action or proceeding "brought under this subsection."[76] The gravamen of this argument is that since the subsection in question permits only a "party aggrieved" at the administrative level to commence a civil action,[77] a successful party at an administrative proceeding is not permitted to institute such an action. Proponents of this position have often cited the Supreme Court decision in *North Carolina Department of Transportation v. Crest Street Community Council.*[78] In that case the Court held that a separate federal action could not be brought solely to recover attorneys' fees under Section 1988 of the Civil Rights Act.[79]

The overwhelming majority of courts have rejected application of the *Crest Street* ruling to actions under the EAHCA, however. Those courts have held that parents *do* have the right to commence an action in federal court solely for the purpose of reimbursement of attorneys' fees.[80] The minority view has not been adopted by any court of appeals, and the authors have found only one district court decision disallowing an independent action in federal court to recover attorneys' fees.[81]

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[74] 1986 U.S. Code Cong. and Admin. News 1804; *Mitten v. Muscogee County School District*, 877 F.2d 932 (11th Cir. 1989), 15 EHLR 441:513; *Counsel v. Dow*, 849 F.2d 731 (2d Cir. 1988),*cert. denied sub nom. Connecticut v. Counsel*, ______ U.S. ______, 109 S. Ct. 391 (1988).

[75] *Medford v. District of Columbia*, 1987-88 EHLR 559:468 (D.D.C. 1988) (attorneys' fees were awarded for time spent at IEP meetings because such attendance contributed to the parents' success in the case).

[76] 20 U.S.C.A. §1415(e)(4)(B) (1990).

[77] 20 U.S.C.A. §1415(e)(2) (1990) provides: "Any party aggrieved by the findings and decision made [in the administrative process] shall have the right to bring a civil action . . . ."

[78] 479 U.S. 6, 107 S. Ct. 336 (1986).

[79] 42 U.S.C.A. §1988 (1981).

[80] *See, e.g., Moore v. District of Columbia*, No. 88-7003, slip op. (D.C. Cir. June 19, 1990) (Westlaw 82248); *McSomebodies v. Burlingame Elementary School District*, 886 F.2d 1558 (9th Cir. 1989), 15 EHLR 441:595; *McSomebodies v. San Mateo City School District*, 886 F.2d 1559 (9th Cir. 1989), 16 EHLR 74; *Mitten v. Muscogee County School District*, 877 F.2d 932 (11th Cir. 1989), 15 EHLR 441:513; *Duane M. v. Orleans Parish School Board*, 861 F.2d 115 (5th Cir. 1988), 15 EHLR 441:240; *Eggers v. Bullitt County School District*, 854 F.2d 892 (6th Cir. 1988), 15 EHLR 441:147; *Counsel v. Dow*, 849 F.2d 731, n.9 (2d Cir. 1988), 15 EHLR 441:164, n.9, *cert. denied sub nom. Connecticut v. Counsel*, ______ U.S. ______, 109 S. Ct. 391 (1988)(dicta).

[81] *Rollison v. Biggs*, 660 F. Supp. 875 (D. Del. 1987), 1986-87 EHLR 558:359.

The Act's legislative history strongly supports the majority view.[82] Clearly Congress could not have relied upon *Crest Street* when enacting the HCPA, since that case was decided after the Act's enactment.[83] Pre-existing case law was in fact established by the Supreme Court in *New York Gas Light Club, Inc. v. Carey*,[84] wherein reimbursement of attorneys' fees was sought for successful pursuit of a claim alleging employment discrimination pursuant to Title VII of the Civil Rights Act of 1964.[85] Noting that it would be anomalous to award attorneys' fees only to a litigant who is not successful at administrative proceedings, the court in *Carey* held that a civil suit could be commenced solely to obtain attorneys' fees for work done in state and local proceedings. Congress explicitly relied upon the *Carey* decision when enacting the HCPA.[86]

B. Prevailing Party

In order for a plaintiff to be considered a "prevailing party" for attorneys' fee purposes, it is sufficient that he or she succeeded on any significant issue that achieved some of the benefits sought.[87] This is the same standard that applies to applications for attorneys' fees by prevailing parties in lawsuits commenced under Section 1988.[88]

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[82] *See, e.g., Mitten v. Muscogee County School District*, 877 F.2d 932 (11th Cir. 1989), 15 EHLR 441:513; *Counsel v. Dow*, 849 F.2d 731, n. 9 (2d Cir. 1988), 15 EHLR 441:164, n.9, *cert. denied sub nom. Connecticut v. Counsel*, ______ U.S. ______, 109 S. Ct. 391 (1988) (dicta); *Williams v. Boston School Committee*, 15 EHLR 441:410, 411 (D. Mass. 1989); *see also*, M. Schreck, "Attorneys' Fees for Administrative Proceedings under the Education of The Handicapped Act: of *Carey, Crest Street*, and Congressional Intent," 60 *Temple Law Quarterly* 599 (1987).

[83] The HCPA was enacted in August 1986 and *Crest Street* was decided in November 1986.

[84] 447 U.S. 54, 100 S. Ct. 2024 (1980).

[85] 42 U.S.C.A. §§2000e-5(k) (1981 and West Supp. 1990).

[86] 1986 *U.S. Code Cong. and Admin. News* 1804.

[87] *See, e.g., Mitten v. Muscogee County School District*, 877 F.2d 932 (11th Cir. 1989), 15 EHLR 441:513 (parents prevailed as to change in "program" although "place" remained unchanged); *Angela L. v. Pasadena Independent School District*, 16 EHLR 74 (S.D. Tex., 1989) (plaintiff achieved some of the benefits sought, to wit, self-contained classroom, speech and occupational therapy and modified curriculum); *Barlow/Gresham Union High School District No. 2 v. Mitchell*, 16 EHLR 157 (D. Or. 1989) (parents prevailed by settlement agreement which permitted socially interactive educational environment for their son in a separate area of the school, although the child was not returned to a regular classroom). *See also, Joiner v. District of Columbia*, 16 EHLR 424 (D.D.C. 1990) (parent achieved primary educational objective by securing child's interim placement until graduation, following administrative decision in favor of school district). *Counsel v. Dow*, 849 F.2d 731 (2d Cir. 1988), 15 EHLR 441:164, *cert. denied sub nom. Connecticut v. Counsel*, ______ U.S. ______, 109 S. Ct. 391 (1988) (plaintiff entitled to attorneys' fees from "state" defendants and not against "local" defendants because plaintiff prevailed on a significant issue against the former and not against the latter).

[88] *See, e.g., Texas State Teacher's Association v. Garland Independent School District*, 489 U.S. ______, 109 S. Ct. 1486 (1989) (the standard under 42 U.S.C. §1988 only requires a party to succeed on a

When enacting the HCPA, Congress intended that the same standard in effect for cases brought under Section 1988 should be applied under the EAHCA.[89] In particular, Congress relied upon the Supreme Court's decision in *Hensley v. Eckerhardt*[90] which, in establishing the "significant issue" standard,[91] further held that, absent special circumstances that would render an award unjust, such a prevailing party should recover attorneys' fees under Section 1988.[92] Most courts deciding cases under Section 1988 have rejected defense claims of "special circumstances" that would render an award unjust.[93] It appears that the same approach will apply in cases under the EAHCA.[94]

A recent case under the EAHCA discussing the "significant issue" or "significant relief" standard is *Mitten v. Muscogee County School District*.[95] In that case, parents requested that their handicapped daughter be placed in a day

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"significant issue" in the litigation and to obtain some of the relief sought; it does not require plaintiff to prevail on the "central issue" of the litigation); *Hensley v. Eckerhardt*, 461 U.S. 424, 433, n.7, 103 S.Ct. 1933, 1939, n.7 (1983) ("[t]he standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party' ").

[89] 1986 *U.S. Code Cong. and Admin. News* 1808; *Mitten v. Muscogee County School District*, 877 F.2d 932 (11th Cir. 1989), 15 EHLR 441:513.

[90] 461 U.S. 424, 103 S. Ct. 1933 (1983).

[91] 461 U.S. at 433, 103 S. Ct. at 1939. Likewise, other Section 1988 cases have held that plaintiffs are considered to be prevailing parties when they have vindicated their rights. *See, e.g., Maher v. Gagne*, 448 U.S.122, 100 S. Ct. 2570 (1980); *Hanrahan v. Hampton*, 446 U.S. 754, 100 S. Ct. 1987 (1980). Still others have held that plaintiffs are to be considered to be prevailing parties when acting as "catalysts" in achieving favorable results. *See, e.g., Maher v. Gagne*, 448 U.S. 122, 100 S. Ct. 2570 (1980) (settlements); *Parham v. Southwestern Bell Telephone Company*, 433 F.2d 421 (8th Cir. 1970) (prompting employer to take action implementing its own fair employment policies and seeking compliance with the Civil Rights Act).

[92] 461 U.S. at 429, 103 S. Ct. at 1937.

[93] *See, e.g., Washington v. Seattle School District No. 1*, 458 U.S. 457, 487, n.31, 102 S. Ct. 3187, 3204, n.31 (1982) (awarding fees although plaintiffs were state-funded entities); *New York Gas Light Club, Inc. v. Carey*, 447 U.S. 54, 70-71, n.9, 100 S. Ct. 2024, 2034, n.9 (awarding fees even though plaintiffs were represented for free by public interest organization); *Lenard v. Argento*, 699 F.2d 874 (7th Cir. 1983) (awarding fees even though plaintiff recovered large damage award, defendants had no substantial resources of their own and a one-third contingency fee agreement existed).

[94] *See, e.g., Independent School District No. 623 v. Digre*, 893 F.2d 987 (8th Cir. 1990), 16 EHLR 420 (hearing officer's erroneous refusal to consider handicapped student's initial identification and placement did not constitute special circumstances rendering award of attorneys' fees unjust as applied to LEA).

[95] 877 F.2d 932 (11th Cir. 1989), 15 EHLR 441:513.

school rather than the residential training center proposed by the LEA. Although the administrative hearing officer rejected the parents' request as to the "place" where the child should be educated, the hearing officer ordered that the child's educational "program" be revamped. Consequently, the Eleventh Circuit awarded attorneys' fees to the parents because they had achieved the "significant relief" sought.[96] The circuit court noted that "[f]ees should, for the most part, be awarded to prevailing parties as a matter of course."[97] Generally, "good faith" on the part of a school district does not negate the right of a prevailing party to recover attorneys' fees.[98]

Furthermore, most courts have held that a plaintiff need not achieve all, or an exact replica, of the specific relief sought in order to be deemed a "prevailing party." For example, in *Reed v. Oakland Unified School District*[99] the district court held that since the parent had obtained a change in placement and additional services at the due process hearing, she had prevailed for the purpose of entitlement to attorneys' fees even though the original request was for speech therapy three times a week and the district had agreed to provide therapy only twice a week. Similarly, in *Kristi W. v. Graham Independent School District*[100] the court held that parents who had prevailed on two out of five points raised before the State Commissioner of Education were "prevailing parties." Of course, if a parent prevails in district court but subsequently loses in the circuit court, he or she will no longer be the prevailing party.[101]

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[96] 877 F.2d at 936, 15 EHLR at 441:515.

[97] 877 F.2d at 937, 15 EHLR at 441:516.

[98] *See, e.g., Mitten v. Muscogee County School District*, 877 F.2d 932 (11th Cir. 1989), 15 EHLR 441:513 (school district unsuccessfully argued that attorneys' fees need not be awarded because the state had not previously provided educational services for severely retarded children); *Espino v. Besteiro*, 708 F.2d 1002, 1005-06 (5th Cir. 1983), 1983-84 EHLR 555:145 (where handicapped student obtained a favorable settlement under Section 1988, the school district unsuccessfully argued good-faith reliance upon a reasonable interpretation of the law); *Mullen v. District of Columbia*, 16 EHLR 792 (D.D.C. 1990) (parents were prevailing parties and were entitled to reimbursement of attorneys' fees where court ordered reimbursement to parents for cost of independent educational evaluation, despite fact that refusal by LEA to pay had been based upon reliance on hearing officer's decision). *See also, Hutto v. Finney*, 437 U.S. 678, 693, 98 S. Ct. 2565 (1979).

[99] 15 EHLR 441:368 (N.D. Cal. 1989).

[100] 663 F. Supp. 86 (N.D. Tex. 1987), 1986-87 EHLR 558:397. *See also, Barbara R. v. Tirrozi*, 665 F. Supp. 141 (D. Conn. 1987), 1986-87 EHLR 558:456 (where a consent decree establishes the most important objective of the suit, abandonment of other claims does not preclude an award of attorneys' fees).

[101] *See, e.g., Gregory K. v. Longview School District*, 811 F.2d 1307 (9th Cir. 1987), 1986-87 EHLR 558:284 (since ultimate decision on appeal was in favor of LEA, parents were not the prevailing party).

C. Calculation of Fees

1. Scope of Services Covered

In addition to awarding fees for time spent during administrative proceedings, courts have awarded attorneys' fees to prevailing parties for work performed prior to a due process hearing.[102] Moreover, a prevailing party may be awarded attorneys' fees for the time incurred in making a motion to recover those fees.[103]

With respect to the various types of activities that are compensable under the EAHCA, considerable case law has developed under Section 1988 that is relevant and applicable by analogy. Under Section 1988, a party who prevails on an appeal is entitled to compensation for time reasonably spent pursuing the appeal;[104] a prevailing party is entitled to compensation for time reasonably expended in monitoring and enforcing a judgment;[105] and a prevailing party's attorneys may be compensated for reasonable travel time, although often at a reduced rate when no legal work is performed during transit.[106]

In addition, the Supreme Court has ruled that the work of paraprofessionals (such as paralegals, law clerks and recent law school graduates) is compensable under Section 1988 and similar fee-shifting statutes at the market rate in the particular community involved.[107] In *Missouri v. Jenkins*[108] the Court upheld hourly rates of $35.00 for law clerks, $40.00 for paralegals and $50.00 for recent law graduates. On the other hand, the court noted that "purely clerical or secretarial tasks should not be billed at a paralegal rate, regardless of who performs them."[109] Likewise, the efforts of parent advocates have been held not to be compensable under the HCPA.[110] This is in accord with the fact that attorneys' fees statutes such as Section 1988 and the HCPA provide for "*attorneys'* fees" to prevailing parties but make no reference to lay advocates.

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[102] *See, e.g., Angela L. v. Pasadena Independent School District*, 16 EHLR 74 (S.D. Tex. 1989) (parent who reached a pre-hearing settlement with LEA permitted to recover attorneys' fees); *Shelly C. v. Venus Independent School District*, 878 F.2d 862, 15 EHLR 441:553 (5th Cir. 1989), *cert. denied*, ______ U.S. ______, 110 S. Ct. ______ (1990) (parents permitted to recover attorneys' fees for work performed prior to due process hearing where ultimate settlement was reached before the hearing); *Anderson v. Syracuse Board of Education*, 15 EHLR 441:338 (N.D.N.Y. 1989) (reasonable attorneys' fees may be awarded for legal work performed in connection with prehearing settlement on underlying claim); *Rossi v. Gusling*, 15 EHLR 441:217 (E.D. Va. 1988) (relying on 20 U.S.C. §1415(e)(4)(D) and the legislative history of the HCPA, the court held that attorneys' fees may be awarded for work performed prior to a due process hearing where an offer of settlement is made more than ten days before such administrative hearing); *Medford v. District of Columbia*, 691 F. Supp. 1473 (D.D.C. 1988) (attorneys' participation in IEP meeting assisted client in eventually prevailing); *but see*, *Dodds v. Simpson*, 1987-88 EHLR 559:320 (D. Or. 1987) (where settlement prior to hearing secured relief sought by parents who nonetheless filed subsequent litigation, court declined to award fees or costs in order to avoid disincentive for prehearing settlement).

[103] *See, e.g., Sidney K. v. Ambach*, 1986-87 EHLR 558:556 (Sup. Ct. N.Y. 1987). *See also, In re Burlington Northern, Inc.*, 832 F.2d 430 (7th Cir. 1987) and *Cruz v. Hauck*, 762 F.2d 1230 (5th Cir. 1985) (wherein the same principle was held applicable under Section 1988).

[104] *Hutto v. Finney*, 437 U.S. 678, 693-700, 98 S. Ct. 2565, 2574-78 (1979).

[105] *See, Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 106 S. Ct. 3088 (1986) (fee relative to federal court consent judgment in suit under Clean Air Act); *Keith v. Volpe*, 833 F.2d 850, 857-58 (9th Cir. 1987) (post-judgment monitoring); *Gautreaux v. Chicago Housing Authority*, 610 F. Supp. 29, 30-31 (N.D. Ill. 1985) (plaintiff-intervenor entitled to compensation relative to its monitoring of defendant's actions to ensure compliance with the court's orders).

[106] *Maceira v. Pagan*, 698 F.2d 38, 40 (1st Cir. 1983) (reduced rate); *In re Agent Orange Product Liability Litigation*, 611 F. Supp. 1296 (E.D.N.Y. 1985), *aff'd* in relevant part, 818 F.2d 226, 238 (2d Cir. 1987) (reduced rate); *Henry v. Webermeier*, 738 F.2d 188, 194 (7th Cir. 1984) (normal rate); *Craik v.*

2. Computation of Awards

The calculation of attorneys' fee awards is addressed by the Act as follows:

> For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.[111]

When Congress enacted the HCPA it intended that

> the term "attorneys' fees as part of the costs" include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the [parents'] case . . . , as well as traditional costs incurred in the course of litigating a case.[112]

Minnesota State University Board, 738 F.2d 348, 350 (8th Cir. 1984) (normal rate); *Johnson v. University College*, 706 F.2d 1205, 1208 (11th Cir. 1983) (reduced rate).

[107] *Missouri v. Jenkins*, 491 U.S. ______, 109 S. Ct. 2463 (1989). *See also*, *Louisiana v. Mississippi*, 466 U.S 921, 104 S. Ct. 1701 (1984) (summer law students); *Vaughns v. Board of Education*, 770 F.2d 1244 (4th Cir. 1985) (paralegal); *Cameo Convalescent Center, Inc. v. Senn*, 738 F.2d 836, 846 (7th Cir. 1984) (law clerk and paralegal fees); *Burney v. City of Pawtucket*, 728 F.2d 547, 550 (1st Cir. 1983) (paralegal); *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983) (paralegals and law students if not normally part of office overhead in the community); *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810, 817 (8th Cir. 1983) (paralegal fees); *Jordan v. U.S. Department of Justice*, 691 F.2d 514, 522-24 (D.C. Cir. 1982) (law students); *Richardson v. Byrd*, 709 F.2d 1016, 1023 (5th Cir. 1983) (paralegals); *Northcross v. Board of Education*, 611 F.2d 624, 638 (6th Cir. 1979) (paralegal services), *cert. denied*, 447 U.S. 911 (1980). For a different approach, *see* two cases decided before *Missouri v. Jenkins*: *In re Agent Orange Product Liability Litigation*, 818 F.2d 226, 238 (2d Cir. 1987) (paralegal time compensable as an expense) and *Abrams v. Baylor College of Medicine*, 805 F.2d 528, 535 (5th Cir. 1986) (cost of paralegal services is covered by attorney billing rates).

[108] 491 U.S. ______, 109 S. Ct. 2463 (1989).

[109] 491 U.S. at ______, n.10, 109 S. Ct. at 2472, n.10.

[110] *See, e.g.*, *Arons v. New Jersey State Board of Education*, 842 F.2d 58 (3d Cir. 1988), 1987-88 EHLR 559:355 (lay advocates are not permitted to recover attorneys' fees under the HCPA).

[111] 20 U.S.C.A. §1415(e)(4)(C) (1990).

[112] 1986 *U.S. Code Cong. and Admin. News* 1808.

Congress explicitly prohibited the use of bonuses or multipliers, however.[113] In so doing, Congress decided to set the EAHCA apart in that regard from other statutes that have been interpreted to permit the application of bonuses or multipliers.[114]

The size of fees ultimately available to a prevailing party is based on a variety of criteria, including the prevailing billing rate in the community, the number of billable hours expended, the extent to which the plaintiff prevailed, the complexity of the litigation, and the adequacy of the legal representation.[115] Information concerning each of these various criteria must be documented by the attorney for a prevailing party when applying to the court for an award of attorneys' fees.[116] There is no artificial ceiling on the amount of fees recoverable,[117] nor is a fee award limited by any lesser amount set forth in a contingency fee agreement.[118]

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[113] *Id.*

[114] The Joint Conference Committee stated that "[t]he conferees do not intend in any way to diminish the applicability of interpretation by the U.S. Supreme Court regarding bonuses and multipliers to other statutes such as 42 U.S.C. §1988." 1986 *U.S. Code Cong. and Admin. News* 1808.

Another legal authority explains that "[t]he calculation of Section 1988 fees for successful Section 1983 claims asserted in conjunction with [EAHCA] claims is governed by the standards for determination of Section 1988 fees generally. However, the standards for calculation of attorneys' fees to the party prevailing on an [EAHCA] claim differ significantly from those under Section 1988 with respect to upward and downward adjustments to the lodestar and the operation of Fed R.Civ.P. 68. See 20 U.S.C. Section 1415(e), as amended." 2 *Section 1983 Civil Rights Litigation and Attorneys' Fees: 1989 Current Developments* 476, 493 (Practicing Law Institute Course Handbook Series No. 381, 1989) (hereinafter *Section 1983 Civil Rights Litigation*). *See also, Hensley v. Eckerhardt*, 461 U.S. 424, 103 S. Ct. 1933 (1983) (in Sec. 1983 actions, the results obtained may lead to an upward or downward adjustment of the lodestar).

[115] *See, e.g., Angela L. v. Pasadena Independent School District*, 16 EHLR 74 (S.D. Tex. 1989) (fee request was reasonable based on degree of skill required, difficulty of issues, contingency fee and the results obtained); *Medford v. District of Columbia*, 1987-88 EHLR 559:468 (D.D.C. 1988) (amount of fee determined by appropriate billing rate, number of billable hours, extent to which plaintiff prevailed and adequacy of attorney's documentation); *Esther C. v. Ambach*, 1986-87 EHLR 558:357 (Sup. Ct. N.Y. 1987) (amount of fee requested was reasonable because it was calculated by using the area prevailing rate, reasonable number of hours in light of the quality of counsel's work, complex nature of the litigation and the results obtained); *J.G. v. Board of Education of the Rochester City School District*, 1986-87 EHLR 558:158 (W.D.N.Y. 1986) (calculation of fee determined based on multiplication of number of billable hours per attorney by the appropriate hourly rate of that attorney).

[116] *See, e.g., Behavior Research Institute v. Ambach*, 15 EHLR 441:324 (App. Div. N.Y. 1988) (the attorney's narrative derived from daily time sheets was insufficient; the time sheets themselves should have been submitted); *Kristi W. v. Graham Independent School District*, 663 F. Supp. 86 (N.D. Tex. 1987) (an itemized accounting was required showing how the fee was computed, the description of the kind and quality of the services rendered and a description of the prevailing rate in the community); *see also, Blum v. Stenson*, 465 U.S. 886, 895-98, n.11, 104 S. Ct. 1541, 1547, n.11 (1984) (fee applications under Section 1983 should be supported through affidavits of actual or prevailing time records).

[117] *See, e.g., Riverside v. Rivera*, 477 U.S. 561, 106 S. Ct. 2686 (1986) (plaintiff received $33,350.00 in damages for violation of civil rights and plaintiffs' counsel received $245,456.00 for attorneys' fees pursuant to Sec. 1988 based upon hours expended), *aff'd*, 763 F.2d 1580 (9th Cir. 1985).

[118] *See, e.g., Blanchard v. Bergeron*, 489 U.S. ______, 109 S. Ct. 939, 944 (1989) (in a Sec. 1988 fee application, contingent fee contract does not impose an automatic ceiling on an award of attorneys' fees).

Case law under Section 1988 cautions that although reconstructed time records may be permitted,[119] reliance on such records or on poor documentation may result in significant reductions of the fees awarded.[120] Some courts require the maintenance of contemporaneous time records as a prerequisite to the recovery of any fees.[121]

3. Publicly Funded Law Offices

Attorneys' fee awards are not limited to instances in which private counsel is retained; fees may be awarded to publicly funded law offices. It has been held that nonprofit law firms may recover attorneys' fees at the same hourly rates applicable to profit-making law firms since such was intended by Congress when enacting the HCPA.[122] Relying on *Blum v. Stenson*,[123] Congress expressly rejected adoption of a standard that would have computed attorneys' fees for publicly funded attorneys in accordance with a cost-based standard rather than the prevailing rate standard. Congress stated that

> Language exists in the bill which limits [attorneys'] fees available to non-profit, publicly funded organizations who provide legal assistance, yet will not limit fees to privately funded attorneys. Undoubtedly, this creates a blatant double standard which will have a particularly negative impact on lower income handicapped children most dependent on legal representation by publicly funded attorneys. Furthermore, by requiring that attorneys' fees awarded to publicly funded attorneys be computed according [to] the cost-based standard rather than the prevailing market-based standard used by private attorneys, a dangerous precedent for all future cases litigated in this area will be set.
>
> We would like to note last year's U.S. Supreme Court decision, *Blum v. Stenson*, where the Court ruled unanimously that under the Civil Rights Attorney Act of 1976, all [attorneys'] fees (including publicly funded at-

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[119] *See, e.g., Jean v. Nelson*, 863 F.2d 759 (11th Cir. 1988); *In re Lawler*, 807 F.2d 1207 (5th Cir. 1987).

[120] *See, e.g., Leroy v. Houston*, 831 F.2d 576, 585-86 (the fee applicant bears the burden of proving the reasonableness of hours spent by proper documentation) (5th Cir. 1987); *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 776 F.2d 646 (7th Cir. 1985) (error in calculation of hours resulted in reduction of fees).

[121] *See, e.g., Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983) (attorneys "must keep meticulous, contemporaneous time records" if they intend to seek attorneys' fees under Sec. 1988); *New York State Association for Retarded Children v. Carey*, 711 F.2d 1136, 1147 (2d Cir. 1983) (contemporaneous time records are a prerequisite for attorneys' fees).

[122] *See, e.g., J.G. v. The Board of Education of the Rochester City School District*, 1986-87 EHLR, 558:158 (W.D.N.Y. 1986); *See also, Eggers v. Bullitt County School District*, 854 F.2d 892 (6th Cir. 1988) (legislative history permits no distinction between private and publicly funded lawyers).

[123] 465 U.S. 886, 104 S. Ct. 1541 (1984).

> torneys' fees), must be calculated according to prevailing market rates. Before congressional intent is created through passage of this provision regarding lower attorneys' fees [awarded] in cases brought to court on behalf of the educational rights of handicapped children, Congress should have the opportunity to closely examine this important issue. It is our belief that after extensive study of this precedent setting issue, Congress will preserve the standards upheld in the *Blum v. Stenson* decision.[124]

4. Nonavailability of Attorneys' Fees

The HCPA explicitly prohibits the awarding of attorneys' fees in situations involving unjustifiable rejection of a properly proposed settlement offer. That Act provides:

> (D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian if—
>
> (i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;
>
> (ii) the offer is not accepted within ten days; and
>
> (iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.
>
> (E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.[125]

The courts will therefore deny attorneys' fees to parents who reject a properly made settlement offer and who ultimately obtain essentially the same relief as was offered previously.[126]

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[124] Additional views of Senators Kerry, Kennedy, Pell, Dodd, Simon, Metzenbaum, and Matsunaga as set forth in 1986 *U.S. Code Cong. and Admin. News* 1806. The alternative view, which would have limited fees to publicly funded attorneys, can be found at 1986 *U.S. Code Cong. and Admin. News* 1804 (setting forth a congressional concern regarding "double-dipping" and reference to awarding fees on the basis of the hourly wages of the publicly funded organization's attorneys involved plus the percentage of the annual overhead attributable to the number of hours reasonably spent on such actions).

[125] 20 U.S.C.A. §§1415(e)(4)(D) and (E) (1990).

[126] *See, e.g., Hyden v. Wilson County Board of Education*, 714 F. Supp. 290 (M.D. Tenn. 1989), 15 EHLR 441:547 (where parents rejected an offer of settlement from the LEA and eventually received essentially the same relief after a due process hearing, they were not entitled to attorneys' fees and costs).

In addition, attorneys' fees under civil rights statutes may ultimately be waived as part of a negotiated settlement. In *Evans v. Jeff D.*[127] the Supreme Court approved the simultaneous negotiation of issues of merit and attorneys' fees and authorized defense offers of settlement which were conditioned upon the waiver of fees. *Evans* purports to recognize a congressional purpose to award fees to prevailing parties rather than to their counsel.

In response to the dilemma created by *Evans*, the plaintiffs' bar in Section 1983 civil rights litigation will commonly draft retainer agreements that condition representation on the client's non-waiver of fees or the assignment of the client's interests in fees to counsel.[128] In the authors' opinion a similar approach by plaintiffs' counsel engaged in litigation under the EAHCA could be pursued.

5. Reduction of Fees

The HCPA also permits the court to reduce attorneys' fees under the following circumstances:

> Whenever the court finds that
>
> (i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;
>
> (ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience and reputation; or
>
> (iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding;
>
> the court shall reduce, accordingly, the amount of attorneys' fees awarded under this subsection.[129]

In other words, the court is expected to balance the equities, as well as to consider what is fair under the circumstances, when exercising its discretion relative to awarding reasonable attorneys' fees.[130]

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[127] 475 U.S. 717, 106 S. Ct. 1531 (1986).

[128] *Section 1983 Civil Rights Litigation* 442-43.

[129] 20 U.S.C.A. §1415(e)(4)(F) (1990). *See also*, *Mathern v. Campbell County Children's Center*, 1987-88 EHLR 559:273, 275 (D. Wyo. 1987) (an integral part of the discretion given the courts by the HCPA is the authority to reduce the amount of the attorneys' fees requested under certain enumerated circumstances); *Max M. v. Illinois State Board of Education*, 1987-88 EHLR 559:406 (N.D. Ill. 1988) (fees requested were reduced because of inadequacies in time reports and hours spent on unrelated claims and also to reflect the attorneys' partial success).

[130] *See, e.g.*, *Howey v. Tippecanoe School Corporation*, 734 F. Supp. 1485 (N.D. Ind. 1990), 16 EHLR 869 (court reduced requested amount of attorneys' fees due to parents' attorneys deliberate conduct in extending the proceedings and making the process overly adversarial).

18

Education for All Handicapped Children Act: Individualized Education Programs

I. Introduction

The culmination of the referral and evaluation process under the EAHCA involves development of an Individualized Education Program (IEP) for each handicapped child. The IEP lies at the heart of the Act because all aspects of a handicapped child's education are both derived from it and governed by it. The IEP not only sets the goals of a handicapped child's educational program, but also controls the placement setting, length of the school year, instructional methodology, extracurricular activities, discipline, and evaluation and measurement criteria for monitoring progress.[1] Essentially, the IEP—if developed and executed using best-practice criteria—is the hub of the education wheel.[2]

This chapter focuses on the EAHCA requirements regarding IEPs. In addition, it addresses the process of developing and implementing appropriate IEPs by combining the legal mandates with good educational practice.

II. Legal Mandates

Any child suspected of having a handicapping condition should be referred to the school district's special education multidisciplinary team (MDT).[3] Once a child is referred, the local education agency (LEA) must evaluate the child to determine if he or she is educationally handicapped and, if so, what educational services the student will require in order to benefit from his or her education. A full and individual evaluation of a student's educational needs must be conducted before any action is taken with respect to initial placement of the child in a special education program.[4]

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[1] Eugene T. Connors and Richard S. Vacca, *IEP's: A Gateway for Legal Entanglement* (National Institute of Education, Educational Resources Information Center, 1981).

[2] *Id.*

[3] Either parents or school personnel can refer a child to the special education committee. Pursuant to 20 U.S.C.A. §1414(a)(1)(A) (1990), however, any LEA that seeks federal funding for its programs must identify, locate and evaluate all handicapped children residing in its jurisdiction.

The student must be tested in his or her native language or other mode of communication and each test administered must be validated for the purpose for which it is being used.[5] The testing must be tailored to assess specific areas of educational need—not merely designed to provide a single general IQ[6]—and the child must be assessed in all areas related to his or her suspected disability "including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities."[7]

The IEP requirement of the Act and its implementing regulations focus on two areas: the IEP meeting and the IEP document. The IEP meeting is designed to provide parents and educators with an opportunity to discuss and develop an educational program for the student. The IEP document (or statement) is the written description of the program developed at that meeting. The EAHCA regulations include stringent requirements for both the IEP meeting and IEP document to ensure that special education decisions are made by a team of people who are knowledgeable both about the specific student's needs and about special education.

A. The IEP Meeting

Each school district must conduct a meeting concerning any handicapped child within 30 calendar days after it is determined that the child is in need of special education and related services.[8]

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[4] 34 C.F.R. §300.531 (1988).

[5] 34 C.F.R. §300.532(a) (1988).

[6] 34 C.F.R. §300.532(b) (1988).

[7] 34 C.F.R. §300.532(f) (1988). In addition, 34 C.F.R. §300.532(c) provides the following guidance to be used when selecting tests to evaluate a child properly:

> Tests are selected and administered so as best to ensure that when a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those skills are the factors which the test purports to measure).

[8] 34 C.F.R. §300.343(c) (1988).

1. IEP Meeting Participants

The participants at an IEP meeting must consist of at least the following: the parents or guardian of the child, the child's teacher, a representative of the local agency or an intermediate educational unit who is qualified to supervise the specially designed educational instruction of the child, and—where appropriate—the child.[9] If a child is being evaluated for the first time, a member of the evaluation team or a person familiar with both the evaluation and the procedures used in the evaluation must be present at the meeting.[10]

The function of the IEP meeting is to provide a forum to allow the parents and the LEA jointly to determine the handicapped child's needs and to develop a program that will provide the student with an appropriate education. Such a meeting (or meetings) must be conducted at least annually to review and update or revise a child's IEP.[11] The parents or the LEA have the right, however, to request a meeting whenever either feels the child's current IEP is not appropriate. The LEA is responsible for setting up and conducting all such meetings,[12] and is expected to act upon all reasonable requests for meetings.[13]

Congress intended to make parents and school districts operate as equal participants in the decisions involving a handicapped child's educational plan.[14] To assist them in fulfilling their role as full participants, parents may bring anyone to the IEP meeting who is familiar with either the education laws or the child's needs.[15]

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[9] 20 U.S.C.A. §1401(a)(19) (1990); 34 C.F.R. §300.344(a) (1988).

[10] 34 C.F.R. §300.344(b) (1988).

[11] 20 U.S.C. §1414(a)(5) (1990).

[12] 34 C.F.R. §300.343(a) (1988).

[13] *See* Department of Education Interpretation: IEP Purpose and Requirements, 46 *Fed. Reg.* 5460 (1981), 1 EHLR 103:43, specifically question No. 11 ("The public agency should grant any reasonable request for such a meeting."). An IEP meeting should be scheduled, for example, if the parents believe the child is not progressing satisfactorily or if there is a problem with the current IEP.

[14] *See, e.g.*, OSEP Policy Letter, EHLR 211:436 (1987) (interpreting 34 C.F.R. §300.343(a) and 300.344(1)(3) to require that IEPs be developed at a meeting where one or both parents participate, and that the parents are expected to be equal participants); OCR Letter of Finding, *Marathon County Handicapped Children's Education Board*, EHLR 352:47 (1985) (parents cannot be excluded from participating in the development of the child's IEP long-term goals and short-term objectives); Division of Policy Analysis and Planning Policy Letter, EHLR 211:316 (1983) (under 34 C.F.R. §300.344 individuals who are involved in the IEP meeting at the discretion of a handicapped child's parents are participants in the meeting and are permitted to be actively involved in the proceedings). *See also*, Department of Education Interpretation: IEP Purpose and Requirements, 46 *Fed. Reg.* 5460 (1981), 1 EHLR 103:43, question No. 26.

[15] *See, e.g.*, OSEP Policy Letter, EHLR 211:408 (1986) (parents are allowed to bring anyone who is familiar with applicable laws and the child's needs to the IEP meeting); OCR Letter of Finding, *Monroe County (Ala.) School District*, EHLR 352:168 (1985) (the IEP requirements were violated when a school district requested that a parent's guest leave the IEP meeting).

LEAs are required to adhere to specified notice procedures that are designed to help parents participate fully in planning their child's education.[16] For example, the LEA must notify parents sufficiently in advance of an IEP meeting to ensure that the parents will have an opportunity to attend.[17] The notice must explain to the parents the purpose, time, and location of the meeting and inform them of who will be in attendance.[18] IEP meetings must be scheduled at a mutually agreeable time and place.[19] A school district may conduct an IEP meeting without the participation of a child's parents *only* when it has documented its unsuccessful efforts to contact the parents and arrange a mutually agreed-upon time and place for such meeting.[20] The LEA must also do whatever is necessary to ensure that the parents understand the proceedings at a meeting—including arranging for an interpreter, where necessary.[21]

The child's teacher must also be present at the IEP meeting.[22] Usually, the teacher attending is the person who is currently working with the child in regard to his or her disability.[23] If a child has both a special education teacher and a regular education teacher, the special education teacher is the person whose attendance would be expected,[24] although both teachers could participate. At initial placement meetings, a teacher qualified to provide the child with the type of educational program the student will need due to his or her disability should attend the meeting, but the child's current teacher could also attend.[25] It is especially important that the person assisting the child in his or her area of particular need attend. If the child's primary disability is a speech-impairment, for example, the speech-language pathologist should be present.[26]

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[16] 34 C.F.R. §300.345 (1988).

[17] 34 C.F.R. §300.345(a)(1) (1988).

[18] 34 C.F.R. §300.345(b) (1988). *See also*, OCR Letter of Finding, *Howard County Public Schools*, 257:311 (1981) (the school must inform the parents who will attend the meeting; parents, however, do not have to give the district notification of the people they are bringing to the meeting and parents may invite as many people as they wish).

[19] 34 C.F.R. §300.345(a)(2) (1988).

[20] 34 C.F.R. §300.345(d) (1988) provides as follows:

> A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place such as: (1) Detailed records of telephone calls made or attempted and the results of those calls[,] (2) Copies of correspondence sent to the parents and any responses received, and (3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

[21] 34 C.F.R. §300.345(e) (1988). This applies for parents who are deaf or whose native language is not English.

[22] 34 C.F.R. §300.344(a)(2) (1988).

[23] *See* comments 1 and 2 following 34 C.F.R. §300.344 (1988).

[24] *Id. See also*, Department of Education Interpretation: IEP Purpose and Requirements, 46 *Fed. Reg.* 5460 (1981), 1 EHLR 103:43, specifically question No. 15 (at least one meeting participant should be a member of school staff who is qualified in the child's area of suspected disability—which could be the child's special education teacher).

The presence of a child's teacher at an IEP meeting ensures the involvement in the development of the IEP of the type of person who will most likely have to implement it. The teacher's particular knowledge provides essential information concerning the placement, programs and services that could or should be employed to meet the goals of the IEP. The child's current teacher is in a unique position to provide input for development of the new IEP and for setting proper goals, because he or she is familiar with the child's needs and learning style and can provide insight concerning the particular instructional methods that have been most effective. Since annual IEP review meetings are often held at the end of the school year, however, the current teacher—who is required to attend the meeting—may not actually be the child's teacher the following year.

The Act does not require the presence of the child's new teacher at the annual review, probably because the identity of the subsequent year's teacher is often unknown at the time of the IEP meeting. Since technically the next year's placement is decided at the IEP meeting, the next year's teacher cannot, as a technical—if not practical—matter, be invited before the meeting. When the IEP team members and the parents have previously discussed a likely placement for the child in the next school year and have reached a general consensus, however, it is advisable for the new teacher to attend the IEP meeting.[27]

Someone other than the child's teacher must serve as the LEA's representative on the MDT.[28] This limitation ensures the availability of a person who is qualified to furnish, or supervise the provision of, special education, and who will be able to (1) see to it that the educational services specified in the IEP will be provided to the child; and (2) preclude vetoing of the IEP by other school administrators who are not part of the MDT.[29] The most appropriate person to serve as the agency representative may vary, depending upon the nature and variety of services needed by the child and upon a determination of whether a continuing placement is anticipated.[30] That person could, for example, be the school principal, a qualified special education administrator, or the pupil services administrator.[31]

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[25] *See* comments following 34 C.F.R. §300.344 (1988).

[26] *See* comments 1(a) and 3 following 34 C.F.R. §300.344 (1988).

[27] *See* Department of Education Interpretation: IEP Purpose and Requirements, 46 *Fed. Reg*. 5460 (1981), 1 EHLR 103:43, specifically question No. 15 (inferring that if the teacher who will be working with the child can be identified, the teacher should be given a copy of the IEP as soon as possible after it is finalized if he or she could not be present at the meeting).

[28] 34 C.F.R. §344(a)(1) (1988).

[29] *See* Department of Education Interpretation: IEP Purpose and Requirements, 46 *Fed. Reg*. 5460 (1981), 1 EHLR 103:43, specifically question No. 13.

The LEA is required to inform parents that their child can attend the IEP meeting, but a child should be present only if it is appropriate.[32] As a practical matter, unless the child's presence would be helpful in developing the IEP or would be beneficial to the child, the child should not attend the meeting. Generally, this means that only older children—such as those in secondary schools—should be encouraged to participate in the development of their IEPs. These children may be able to provide insight not available from others. They may also benefit from participation as a step toward more independence since they may soon need to prepare for the transition from school to employment or postsecondary education.

2. The Process and Outcomes Associated with the IEP Meeting

The IEP meeting participants, in focusing on the idiosyncratic needs of the individual student, should review the student's current records, the current IEP (if one exists), and any other recent evaluations or relevant information available. Meetings to review the handicapped child's placement and goals must be conducted periodically but not less than annually.[33]

At an annual meeting, the MDT should ensure that the current IEP meets the student's needs and accurately portrays his or her current status. During this meeting, the team should: (a) consider whether the current annual goals and short-term objectives have been met; (b) determine appropriate new goals and objectives; and (c) consider whether the child is ready to enter a program in a less restrictive environment.

If a parent and an LEA cannot agree on an IEP, the parties should determine an interim program and placement for the child[34] and proceed to an impartial hearing. A due process hearing may be initiated by either party.[35]

IEP meetings can be recorded at the discretion of either the parent or the LEA and with or without the consent of the other party.[36] At least one court has required an LEA to permit a parent to tape record an IEP meeting when such recording was necessary for the parent to effectively participate in the planning and evaluation of the IEP.[37] These recordings, as well as the IEP, must be kept confidential by the LEA.[38]

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[30] *Id.*

[31] *Id.*

[32] 34 C.F.R. §300.344(a)(4) (1988).

[33] 34 C.F.R. §300.343(d) (1988). *See also*, OSEP Policy Letter, EHLR 211:349 (1984).

[34] Under 34 C.F.R. §300.513 (1988), the child is to remain in his present educational placement until the matter is resolved, unless the parents and the school can decide on an interim placement program.

[35] 34 C.F.R. §300.506(a) (1988).

[36] *See, e.g.*, OSEP Policy Letter, 13 EHLR 213:127 (1988); OSEP Policy Letter, EHLR 211:408 (1986); OSEP Policy Letter, EHLR 213:104 (1987); OSEP Policy Letter, EHLR 211:279 (1987).

Once an IEP is developed, there can be no undue delay in providing the specified special education and related services.[39] The failure of an LEA to locate teachers or services to implement the IEP can cause a school district to be in violation of both the EAHCA and Section 504.[40] An LEA does not violate Section 504, nor presumably the EAHCA, however, if it fails to implement a recommended IEP because the parents refuse to consent to it.[41]

B. The IEP Statement

The IEP provides a narrative description of the child and defines the elements of an appropriate education for that child.[42] It is intended to state the child's present level of performance accurately and to project what the child should be able to accomplish during the year—in other words, to set goals, design short-term objectives, and determine what programs and services are appropriate to enable the child to achieve those goals.[43]

The IEP also provides a mechanism to help ensure accountability in the planning and delivery of services to handicapped children. It does so by

> [setting] forth in writing a commitment of resources necessary to enable a handicapped child to receive needed special education and related services[;] . . . [serving as] a management tool that is used to ensure that each handicapped child is provided special education and related services appropriate to the child's special learning needs[;] . . . [serving as] a compliance/

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[37] *E.H. v. Tirozzi*, 735 F. Supp. 53 (D. Conn. 1990), 16 EHLR 687 (parent with difficulty understanding English was entitled to tape record IEP meeting in order to permit her to listen to discussion at home with a dictionary; the tape recording was thus an essential part of the parent's participation in the planning and evaluation of the IEP).

[38] 34 C.F.R. §§300.560-300.576 (1988). *See also*, Family Educational Rights and Privacy Act, 20 U.S.C.A. §1232g (1990).

[39] 34 C.F.R. §300.342(a)(2) (1988).

[40] 34 C.F.R. 300.349 (1988) requires the district to provide the special education and related services specified in the IEP. The district is not held accountable, however, if the child fails to meet the specified goals. *See, also*, Department of Education Interpretation: IEP Purpose and Requirements, 46 *Fed. Reg.* 5460 (1981), 1 EHLR 103:43, specifically questions Nos. 44 through 47.

[41] OCR Letter of Finding, *Lake Mills Area School District*, EHLR 352:222 (1986).

[42] 20 U.S.C.A. §1401(a)(19) (1990); 34 C.F.R. §300.346 (1988).

[43] *Id.* In some instances a handicapped child's school year can be twelve months. For a more detailed discussion of extended school year programs, *see* chapter 16 of this text, *supra*.

> monitoring document which may be used by authorized monitoring personnel from each governmental level to determine whether a handicapped child is actually receiving the free appropriate public education agreed to by the parents and the school[; and serving] . . . as an evaluation device for use in determining the extent of the child's progress toward meeting the projected outcomes.[44]

Although IEP forms differ, the EAHCA establishes minimum acceptable standards for IEP statements.[45] As defined therein, an IEP is

> a written statement for each handicapped child developed in [a] meeting . . . which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.[46]

Many states require that other criteria be included in the IEP, but at the bare minimum an IEP must contain these five elements.

Although the Act sets forth this general description of the contents of an IEP, it specifies that the IEP must meet the individual needs of the particular child. The law prohibits "the design of IEPs by definitions of handicapping conditions or other types of categorical programming" instead of on an individualized basis.[47] Moreover, the IEP must be based on the needs of the child and not on the services available.[48]

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[44] Department of Education Interpretation: IEP Purpose and Requirements, 46 *Fed. Reg*. 5460 (1981), 1 EHLR 103:43, specifically Parts c-f.

[45] 20 U.S.C.A. §1401(a)(19) (1990); 34 C.F.R. §300.346 (1988).

[46] 20 U.S.C.A. §1401(a)(19) (1990).

[47] DAS Bulletin No. 23, EHLR 203:03 (1978). *See also*, 34 C.F.R. §300.346 (1988) and OSEP Policy Letter, EHLR 211:464 (1987) (it is impermissible for students in a class to have identical statements of present levels of educational performance in their IEPs).

[48] OCR Letter of Finding, *Santa Clara County Office of Education*, EHLR 257:379 (1983) (an IEP that was based on the ability of the district to deliver the services rather than on the child's needs violated 34 C.F.R. §300.346). *See also*, BEH Policy Letter, EHLR 211:146 (1979) (although the law does not require districts to provide the best education possible, an IEP must be written by trained personnel without regard to availability of services). *See also*, Department of Education Interpretation: IEP Purpose and Requirements, 46 *Fed. Req*. 5460 (1981), 1 EHLR 103:43, specifically questions Nos. 44 and 45 (the IEP must include all services needed by a handicapped child and all services listed must be provided).

Logically, the first part of an IEP statement should describe the child's current status. This description should include the impact that the child's disability has on his or her educational performance in both academic and nonacademic areas.[49] Ideally, the description should cite not only the student's weaknesses, but also his or her strengths. Test scores and evaluations should be included only if they are pertinent to placement. When such scores are noted, the significance of each score should be explained.[50] All of the IEP components should relate to the child's current status, and any program or service included must relate to the child's current needs.[51]

The next task for the MDT is to determine annual goals, or estimations of what the child can reasonably be expected to accomplish within a twelve-month period.[52] The goals should focus on attempting to reduce or minimize the educational problems resulting from the student's handicap, while building upon his or her strengths.

The building blocks for each annual goal must be delineated by intermediate steps called short-term objectives,[53] which describe the student's expected accomplishments within specified time periods during the year. The objectives serve as opportunities for measurement so that all parties can monitor the child's progress toward achieving the annual goals.[54] The IEP must set forth criteria to be used for measuring this progress.[55]

The special education and related services to be provided are also specified in the IEP.[56] Such services should be designed so as to enable the child to attain both the short-term objectives and annual goals. In addition to noting the time when the plan will be commenced and the anticipated duration of such special services,[57] the

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[49] Department of Education Interpretation: IEP Purpose and Requirements, 46 *Fed. Reg.* 5460 (1981), 1 EHLR 103:43, specifically question No. 36.

[50] *Id.*

[51] *Id.*

[52] Department of Education Interpretation: IEP Purpose and Requirements, 46 *Fed. Reg.* 5460 (1981), 1 EHLR 103:43, specifically question No. 38. *See also*, Bonnie Strickland and Ann Turnbull, *Developing and Implementing Individualized Education Programs*, (Merrill Publishing Co., Columbus Ohio, 3d edition, 1990) (hereinafter Strickland and Turnbull) at 217.

It should be noted that the comment following 34 C.F.R. §300.349 clarifies that an annual goal is not a guarantee by an LEA or educator, only a responsibility to make a good-faith effort to reach those goals.

[53] *See* Department of Education Interpretation: IEP Purpose and Requirements, 46 *Fed. Reg.* 5460 (1981), 1 EHLR 103:43, specifically question No. 39.

[54] *Id.*

[55] 34 C.F.R. §300.346(e) (1988).

[56] 34 C.F.R. §300.346(c) (1988).

[57] 34 C.F.R. §300.346(d) (1988). Note that 34 C.F.R. §300.342(b)(2) requires implementation as soon as possible after the IEP meeting.

IEP must state the extent to which the student will participate in regular education.[58]

Parents' signatures are not required on a child's IEP,[59] but parental consent is required for an initial special education placement.[60] A parent's signature on the IEP can constitute such consent if the parent has been properly advised and the IEP contains the proper consent language.[61] In addition, the signatures of both parties can be required to signify attendance at a meeting or to show that the parents have consented to the placement and program as well as that the LEA has agreed to provide the services stated in the IEP.[62]

The LEA is not required automatically to provide parents with a copy of the IEP. Rather, parents must first request such a copy.[63] When an initial placement is at issue, however, and parental consent is required, the IEP may have to be provided to the parents.[64] Consistent with the notion that parents are equal participants in developing the IEP, the language in the IEP should be written so that it is comprehensible to the parents.[65]

An IEP remains in effect until it is revised or a new IEP is implemented.[66] Revision of an IEP by an LEA is not allowed without prior notification to the parents describing the proposed change and the underlying reasons for that change.[67] Although parental consent is not technically required in order to change the IEP of a child already in a special education program, parents have the practical equivalent since they can prohibit a change—at least for so long as the administrative and judicial process continues— by requesting a due process hearing.[68] If a child moves from one school district to another, the child's former IEP is to be implemented until the new district evaluates the child and creates a new IEP.[69]

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[58] 34 C.F.R. §300.346(c) (1988); BEH Policy Letter, EHLR 211:119 (1979) (34 C.F.R. §300.346(c) requires an IEP to indicate the extent to which a child will participate in regular education; the regulations, however, do not require a detailed description of goals and objectives for regular education).

[59] OSEP Policy Letter, 16 EHLR 800 (1990); OSEP Policy Letter, EHLR 211:410 (1986).

[60] 34 C.F.R. §300.504 (b)(1)(ii) (1988).

[61] OSEP Policy Letter, 16 EHLR 800 (1990); 34 C.F.R. §300.500 (1988) provides:

> As used in this part: "Consent means that: (a) The parent has been fully informed of all information relevant to the activity for which consent is sought . . . (b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity . . . (c) The parent understands that the granting of consent is voluntary . . .. and may be revoked at any time.

[62] OSEP Policy Letter, 16 EHLR 800 (1990); Department of Education Interpretation: IEP Purpose and Requirements, 46 *Fed. Reg*. 5460 (1981), 1 EHLR 103:43, specifically question No. 29.

[63] 34 C.F.R. §300.345(f) (1988).

[64] 34 C.F.R. §300.504(b)(1)(ii) (1988). Presumably, in order for parental agreement to constitute informed consent, the parents should have an opportunity to review the proposed IEP before agreeing to it.

[65] OCR Letter of Finding, *Rockford School District No. 205*, EHLR 352:465 (1987).

[66] OCR Letter of Finding, *Central Valley District No. 410*, EHLR 257:166 (1979).

[67] 34 C.F.R. §300.504(a)(1) (1988) and §300.505 (1988).

Although an LEA must provide the services specified in a child's IEP, neither the LEA nor any of its staff is responsible for guaranteeing that a child will achieve the IEP's annual goals or short-term objectives. The LEA and its staff are only required to implement the IEP[70] and to make a good-faith effort to help the child achieve the IEP objectives and goals.[71] The EAHCA does not make anyone accountable for a shortfall.[72]

III. Developing an Effective IEP

A. Preparation for the IEP Meeting

1. The School District

The first step an LEA should take when preparing for an IEP meeting is to confirm that the child has been thoroughly evaluated. Since parental consent is required before an LEA may conduct an initial evaluation of a child,[73] documentation of proper consent should also be verified. All relevant records—including evaluations—must be made available to the parents.[74] The records should be checked to ensure the presence of required documentation, including all notices required by the Act and its regulations.[75] It is inappropriate, however, for an LEA to develop an IEP before meeting with the parents. Such a procedure undercuts the role of parents acting as partners with the school agency.[76]

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[68] 34 C.F.R. §300.506 (1988); 34 C.F.R. §300.513 (1988). For a more detailed description of the stay-put provision, *see* chapter 14 of this text.

[69] *See* OCR Policy Letter, EHLR 211:403 (1986) (stating that the receiving school must implement the IEP of the sending school until it develops a new one).

[70] 34 C.F.R. §300.349 (1988).

[71] *See* comment following 34 C.F.R. §300.349 (1988); BEH Policy Letter (Pheil), EHLR 211:117 (1979).

[72] 34 C.F.R. §300.349 (1988). *See also*, OCR Letter of Finding, *Lake Mills Area School District*, EHLR 352:222 (1986).

[73] 34 C.F.R. §300.504 (1988) and 34 C.F.R. §300.505 (1988). Note that as with other aspects of this procedure, the notice seeking consent must be written in the native language of the parents or any other mode of communication used by the parents and in an understandable manner.

[74] 20 U.S.C.A. §1415(b)(1)(A) (1990) and 34 C.F.R. Sec.300.502 (1988). As required by 34 C.F.R. §300.562 (1988), the agency must provide the records upon parental request without unnecessary delay and before any IEP meeting or hearing related to the identification, evaluation or placement of the child is conducted. In no case are the documents to be provided more than 45 days after the request by the parents.

2. The Student

Over 90 percent of parents and 75 percent of students questioned in a 1981 study agreed that students should participate in the development of the IEP.[77] Such participation usually results in an IEP that better reflects the individuality of the student.[78] In deciding whether it is appropriate for their child to attend his or her IEP meeting, however, parents should consider the following: (1) whether the child can understand the IEP process, (2) whether the child can communicate his or her preferences and interests either verbally or nonverbally, and (3) whether the child understands conversations conducted in simple language. If the parents and child agree that the child should be present, all efforts should be made to make the meeting as non-threatening as possible. The child should be cautioned that not all of the recommendations that he or she suggests will necessarily be followed.[79]

3. The Parents

Because it is important that parents play an active role in the development of the educational program for their handicapped child,[80] they should prepare carefully for the IEP meeting. First, they should review the evaluations of their child. If they disagree with the findings, they should proceed to obtain an independent evaluation.[81] Next they should make a list of their child's strengths and weaknesses, their child's needs—including the type of environment that the child will require—and the services necessary to facilitate the student's ability to learn.[82] They should determine realistic goals they would like their child to meet during the coming year and set priorities among these goals.[83]

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[75] *See* Section IIA of this chapter, *supra*, for a description of notice requirements.

[76] *See* Department of Education Interpretation: IEP Purpose and Requirements, 46 *Fed. Reg.* 5460 (1981), 1 EHLR 103:43, specifically question No. 26 describing the parents' role as being active participants.

[77] Ellen B. Gillespie and Ann P. Turnbull, "It's My IEP: Involving Students in the Planning Process," 16 *Teaching Exceptional Children*, 1 (Fall 1983) at 27.

[78] *Id.*

[79] *Id.* at 28.

[80] Department of Education Interpretation: IEP Purpose and Requirements, 46 *Fed. Reg.* 5460 (1981), 1 EHLR 103:43, specifically question No. 26.

[81] 34 C.F.R. §300.503 (1988). Parents have a right to obtain an independent educational evaluation. A parent can request the LEA to pay for the independent evaluation; however, the LEA is entitled to request a hearing and allow a hearing officer to determine whether the LEA should pay for that evaluation. The determining factor in regard to whether an independent evaluation is to be at public expense is whether the LEA's evaluation was appropriate and complete. Even when the LEA is not required to pay, the parents can pay for independent evaluations to be conducted. If independent evaluations are conducted, they must be considered when formulating the child's IEP (34 C.F.R. §300.503(c)). For a more detailed discussion of independent educational evaluations, *see* chapter 15 of this text, *supra*.

Finally, the parents should review the identities of those individuals on the list of people who will be attending the IEP meeting. If the parents believe that any school personnel not already listed should be present at the meeting, they should make such a request to the LEA at the earliest opportunity.[84]

The parents should bring to the meeting written notes about their concerns, opinions and expectations for both their child and the delivery of educational services to their child. They should know what they would like to see occur in their child's program.

B. The IEP Meeting

The parents and the LEA should work cooperatively and strive to make the process as non-adversarial as possible. Each should respect the other's comments, focusing on the purpose of the meeting: to develop an IEP that meets the unique and individual needs of the child. The parties should realize that this is an excellent opportunity for them to share resources and perspectives in order to better develop a proper program for the child.[85]

To begin the meeting, each person present should introduce him or herself and state his or her connection with the child (parent, teacher, psychologist, speech therapist, principal, and so forth). All parties should have on paper—or at least in their minds—a general outline of the program they would propose for the child. It is critical to effective planning, however, that each participant be willing to listen to and learn from the others.[86]

To help the parents feel less intimidated by the process, the LEA participants should avoid using educational jargon or confusing language.[87] Moreover, the team should ask the parents for feedback and provide them with an opportunity to discuss and share their concerns about their child. The LEA participants should attempt to answer any questions posed by the parents and should not criticize, condemn or complain about other participants.[88] It is essential that parents understand the meeting and the process; their mere presence is not sufficient.[89] The entire group should remember that since a student may remain in the educational system until age 21, parents and educators will have to work together for many years. This alone should provide an incentive for everyone to attempt to maintain a good relationship.

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[82] Barbara E. Buswell and Judy Veneris, *Building Integration with the I.E.P.* (PEAK Parent Center, Colorado Springs, Colo., 1989) (hereinafter Buswell and Veneris) at 11.

[83] *Id.*

[84] *See* 34 C.F.R. §300.344(a)(5) (1988) (requiring the LEA to ensure participation at IEP meetings of persons designated by the parents).

[85] Kevin J. Swick, Carol Flake-Hobson and Gail Raymond, "The First Step: Establishing Parent-Teacher Communication in the IEP Conference," 12 *Teaching Exceptional Children*, No. 4:144 (Summer 1980) (hereinafter Swick, Flake-Hobson and Raymond) at 145.

[86] Reed Martin, *Educating Handicapped Children: The Legal Mandate* (Research Press Co., Champaign, Ill., 1979) (hereinafter Martin, *Educating Handicapped Children*) at 78.

[87] Swick, Flake-Hobson and Raymond at 145, and Philip Jones, *A Practical Guide to Federal Special Education Law Understanding and Implementing PL 94-142* (Holt, Rinehart and Winston, 1981) (hereinafter Jones) at 84.

During the meeting the MDT must identify the individual child's strengths and weaknesses, determine the needs that adversely affect his or her educational performance, and indicate any gap between reasonable performance expectations for the child and the child's current performance. It should then craft a program to render those two performance factors as congruent as possible.[90]

In order to identify the manner in which the child's disabilities adversely affect his or her educational performance, the parents and the LEA should compare the child's level of functioning with typical educational expectations for non-handicapped peers.[91] To assist in making such a comparison, a list of factors relevant to such an evaluation should be compiled. Such a list might cover the child's activities during the typical school day—including extracurricular activities—and a typical child's activities outside of the school—including recreation, shopping, playing with other children and membership in such organizations as Cub Scouts and Girl Scouts. The list might include the following areas, for example:

- use of regular transportation or walking to school;
- accessibility of the school (*e.g.*, are there physical barriers?);
- reporting to homeroom;
- following school rules;
- performing regular curriculum with quantity and rate of instruction aimed at graduation by specified age;
- reading;

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[88] Martin, *Educating Handicapped Children, supra* note 86, at 79.

[89] 34 C.F.R. 300.345(e) (1988). *See also*, N. Jorge DaSilva, *A New Approach to Understanding PL 94-142: Procedural Safeguards*, (Academic Therapy Publications, Novato,Cal., 1981) (hereinafter DaSilva) at 58.

[90] Stanley L. Deno and Phyllis K. Mirkin, "Data Based IEP Development: An Approach to Substantive Compliance," 12 *Teaching Exceptional Children*, No. 3:92, (Spring 1980) (hereinafter Deno and Mirkin).

[91] Reed Martin, "How to Develop an IEP that Works" (Legal Challenges in Special Education Series No. 3)(Carle Foundation for Health Law and Ethics, Urbana, Ill., 1989) (hereinafter Martin, "How to Develop an IEP that Works").

- participating in physical education, art, music, library and other "special" classes;
- use of restrooms and water fountains;
- changing classrooms during daily routines and schedules;
- buying and eating lunch in the cafeteria;
- attending general assemblies;
- participating in recess with others;
- taking examinations;
- participating in extracurricular activities; and
- tracking homework assignments, doing homework and turning assignments in on time.[92]

In developing the goals the child is expected to attain, parents and educators should also consider means of integrating the child with non-handicapped children to the maximum extent appropriate.[93] A critical question that should be posed throughout the process of ascertaining the appropriate goals for a child is: what would a non-handicapped peer of the same age do during a typical school day?[94]

In addition to holding an initial meeting to develop an IEP and an annual meeting to review the child's IEP, the MDT should assemble to review and revise an IEP *any* time a party thinks the IEP is not meeting the child's needs or the child has already met the IEP goals.[95] In other words, although the Act requires IEPs to be reviewed at least annually, an IEP should be updated to keep pace with the changing needs of the handicapped child.[96]

After discussing the child's past performance, current status, and goals (with short-term objectives), the parties must decide on the proper placement and program for the child. An IEP must be developed that will implement these determinations and provide assistance to the teachers whose responsibility they will become.

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[92] Adapted in part from Martin, "How to Develop an IEP that Works," *supra* note 91.

[93] 34 C.F.R. §300.550(b) (1988) requires that handicapped children be educated in a least restrictive environment (LRE)— which means to the maximum extent appropriate with children who are not handicapped.

[94] This question is important for several reasons. First, the LRE mandate requires mainstreaming the handicapped child whenever possible; if necessary, modifications and adaptations should be provided to accomplish this goal. Also, to the extent possible, handicapped children should participate in age-appropriate activities (non-academic as well as academic) and be instructed with age-appropriate materials. Failure to consider typical activities of nonhandicapped children often leads to repetition and reinforcement of non-normalized functioning and behavior that can occur in self-contained groupings of students with disabilities.

[95] DaSilva, *supra* note 89, at 54.

[96] *Id.*

C. The IEP Statement

When writing each part of the IEP statement, the MDT should bear in mind that the ultimate goal of education is to produce citizens who are able to function and live in society. Although an IEP is developed for no more than one year, the student's life after public education is the backdrop against which the IEP must be measured. Congress enacted the EAHCA in part because handicapped children were not receiving sufficiently appropriate services to enable them to have full equality of opportunity; thus, the Act was designed to address this deficiency.[97]

When educational plans for non-handicapped students are developed for each grade level, teachers have the ultimate goal of instructing children so that upon graduation they will be prepared for college or have vocational skills that will enable them to be employed. Further, schools generally provide instruction in life skills that will enable the student to function as an adult in the community. There is no basic difference between these goals and the longitudinal educational goals for students with disabilities. For a handicapped child to truly benefit from his or her education and receive equal protection under the law, annual IEPs should be constructed within the context of anticipated future outcomes for this child (postsecondary education, regular diploma, IEP diploma, living and working in the community, and so forth). Continually referring to these future goals as IEPs are developed typically results in more longitudinally sound educational plans and resultant outcomes.

The EAHCA delineates the contents of an IEP but does not require a specific format. Because IEPs are to be individualized, however, it is not appropriate to create a standard IEP form that is anything more than a shell. Thus, any pre-printed form for IEPs should be carefully designed to ensure that legal requirements are met while retaining flexibility to individualize.[98] A sample IEP form that complies with the mandates of the Act and also incorporates good educational practice can be found in appendix I. A checklist for possible IEP content appears in appendix J.

A detailed IEP is worth the additional paperwork involved because it can assist teachers in better understanding the child's needs, which is essential for effective instructional planning. If developed properly the IEP can also serve to structure a meaningful progress report or report card. By including a few extra columns for checkmarks and dates that reflect a child's progress toward a certain goal or objective, the IEP statment can help both the teacher and parents track the child's progress throughout the year.[99]

An IEP statement that merely sets forth the five components required by law may not satisfy the intent of the law if it fails to provide enough information to serve adequately as a management tool and communications device.[100] With the EAHCA, as with any law, there are two distinct aspects of compliance—procedural compliance and substantive compliance. The distinction between these two forms of compliance with the EAHCA is significant, because an LEA that merely meets the letter of the law may fail to meet its intent.[101] The IEP must be able to serve as a management tool and communications vehicle in order to ensure that both the LEA and parents are clearly aware of the child's needs, the services that will be provided to the child, and the anticipated outcomes of the provided services.[102]

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[97] 20 U.S.C.A. §1400(b)(3) (1990).

[98] DaSilva, *supra* note 89, at 60.

[99] Jones, *supra* note 87, at 82.

Much of the criticism leveled at inadequate IEPs is that they are (1) incomplete (do not contain the five components required by law), (2) vague (do not really describe the child's needs and provide specific goals and objectives), or (3) incomprehensible.[103] To ensure compliance with the letter and spirit of the Act, each of the five major areas addressed in the IEP must be considered, not only in relationship to the literal language of the Act and its implementing regulations, but also in view of the IEP's central role for describing, driving and monitoring a FAPE.

Area One. Current Educational Performance

The first required portion of the IEP is meant to provide relevant background information about the child, to assist all persons involved in implementing the IEP, and to reflect the student's performance on assessments. The description should consider reports from each person who evaluated the child in preparation for the IEP meeting. Specifically, the IEP statement should include: (1) the child's academic achievement; (2) the child's testing scores (with an evaluation of the scores); (3) a physical report; (4) a description of the child's emotional maturity, self-help skills, social adaptation and development (social history); and (5) a statement of the child's prevocational and vocational skills.[104] It must describe the child's disabilities and needs as they relate to his or her present educational and social skills.

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[100] Department of Education Interpretation: IEP Purpose Requirements, 46 *Fed. Reg.* 5460 (1987), 1 EHLR 103:43.

[101] Deno and Mirkin, *supra* note 90, at 92.

[102] *Educating the Handicapped: Where We've Been, Where We're Going*, an Education USA Special Report, published by the National School Public Relations Association (hereinafter *Where We've Been, Where We're Going*) at 44.

[103] *Id.*

[104] This is consistent with the spirit of the Act since any annual goals and short-term objectives should be based in part on the child's current functioning. This section of the IEP helps to describe the problems that interfere with the child's education so that annual goals can be developed. The needs must be set forth in the IEP so that everyone working with the child knows the level at which the child is functioning and can develop an IEP that will provide the child with an appropriate education. *See also*,

The child's strengths and weaknesses in each area of need should be specified, as should an explanation of how the child is best able to learn (including, for example, a description of the methodologies or modalities that are most effective for this child). The child's social and emotional behavior (including his or her interactions with adults and peers) should also be described in this section of the IEP, since these behaviors may affect learning. The student's current status should include a physical assessment and description of any medical or health problems that may impact on instructional programming. This might include, for example, information concerning seizures, medications, equipment needs, allergies, heart defects, physical limitations, movement problems, hearing or visual problems, prosthetic needs, positioning difficulties, and any gross or fine motor skill problems.

If the child is currently in school, a report from the student's present teacher, including a discussion of the child's progress toward the annual goals in any previous (current) IEP, belongs in this section. Because educational performance is such a broad term for this population,[105] this first section of the IEP must be all encompassing so as to provide a baseline that reflects the entire range of the child's needs.[106] Once a complete assessment of the child's current educational performance has been provided, the MDT must proceed to specify annual goals and short-term objectives for the child. These goals should relate to the assessment data.[107]

Area Two. Part One: Annual Goals

The annual educational goals that are developed must directly correlate with the child's present performance levels as delineated in the first portion of the IEP.[108] The task for the MDT is to determine what skills are appropriate for the child in order to set annual goals based on his or her mental and chronological age. The place to begin is to analyze the child's typical day[109] and develop goals for each of the areas in which the child has difficulty. These goals should be set at the highest

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Department of Education Interpretation: IEP Purpose and Requirements, 46 *Fed. Reg.* 5460 (1981), 1 EHLR 103:43, specifically question No. 36; Strickland and Turnbull, *supra* note 52, at 203 and 208; and J. Chalfant and M. Van Dusen Pysh, The Compliance Manual: A Guide to the Rules and Regulations of the Education for All Handicapped Children Act, Public Law 94-142, (Pem Press, New Rochelle, New York, 1980) (hereinafter Chalfant and Pysh) at 67.

[105] *See* chapter 16 of this text, *supra*, for a discussion of the breadth of the meaning of "education" for handicapped children.

[106] Martin, *Educating Handicapped Children*, *supra* note 86, at 80.

[107] Strickland and Turnbull, *supra* note 52, at 115.

[108] *See* Department of Education Interpretation: IEP Purpose and Requirements, 46 *Fed. Reg.* 5460 (1981), 1 EHLR 103:43, specifically question No. 38.

[109] *See* text accompanying note 92, *supra*.

skill level the child is expected to be able to attain in one year.[110] A checklist of preschool and school-age concerns and skills, such as that sampled in appendix K,[111] or of curriculum features, such as those sampled in appendix L, can be helpful in determining a child's goals. What is most important is that the annual goal is set at a level the child has a reasonable chance of attaining within the school year. Checklists for helping the team reach this goal are available in material such as that sampled in appendix M.[112]

Although the IEP's annual goals must address the next school year, the team should keep in mind that the ultimate goal of the EAHCA is to provide handicapped children with a future.[113] Thus, when appropriate, annual goals should reflect vocational as well as nonvocational skills, and skills related to daily living as well as academic skills.[114] Moreover, the MDT should be familiar with the diploma requirements for the school and develop IEPs that enable the student to receive a diploma, if appropriate.

The purpose of education is to produce productive citizens who can live in and contribute to their communities. This should be the long-term goal for non-handicapped students and students with disabilities alike. This long-term focus is especially important for students in secondary schools, because once a child turns 21, the state is no longer obligated to provide educational services for the child.[115] The educational team must strive to ensure that by the time of graduation, a student has the necessary skills to live in the community, find a job, proceed to higher education, or function in the least restrictive setting commensurate with his or her abilities.[116]

When developing annual goals, it is also important for the MDT to capitalize on the child's strengths.[117] Both the child's past and present performance, his or her preferences, the priority of various needs and the amount of time anticipated for the child to attain each of the goals should be considered.[118] While seeking to foster a child's strengths, the MDT should also develop goals that will assist the child to overcome or minimize his or her areas of need toward the end that the disability will be of as little a hinderance as possible to the child's ability to function in daily life.

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[110] Alice H. Hayden and Eugene Edgar, "Developing Individualized Education Programs for Young Handicapped Children", 10 *Teaching Exceptional Children*, No. 3: 67 (Spring 1978) at 70.

[111] These checklists are taken from Strickland and Turnbull, *supra* note 52, 375-83 and 465-500.

[112] Maynard C. Reynolds, "Staying Out of Jail," 10 *Teaching Exceptional Children*, No. 3:60 (Spring 1978) at 62.

[113] *See* 20 U.S.C.A. §1400(b)(3) (1990) which provides that handicapped children are to be given an education that meets their needs and allows them to have full equality of opportunity.

[114] *See, e.g.*, 34 C.F.R. §§300.306 (1988) and 300.553 (1988) which require IEPs to be developed for nonacademic areas as well as academic areas, including meals, recess, and sports.

[115] The maximum age is actually 21 or 22, depending on the time of the year the individual's birthday occurs and the cut-off date set by state law.

[116] *See* appendix M, excerpted from Strickland and Turnbull, *supra* note 52, for checklists of vocational skills, functional living skills, behavior skills and functional communication skills.

[117] Buswell and Veneris, *supra* note 82, at 11.

The annual goals should be written clearly and in a positive and understandable manner. Goals should not be too broad or vague, nor should they be as specific as the short-term objectives. (See examples in box below.) There should be at least one annual goal to address each area of need, but the MDT should consider the relevance and practicality of the goals in light of the remaining amount of time the child will continue to be in the educational system. The MDT may need to set priorities among the goals to avoid misusing the valuable time the child has left.[119]

Assume that you are participating on the MDT responsible for creating an IEP for a five-year-old girl, Sarah. Sarah—who is of average intelligence but functions below her capability—has been found to have learning disabilities. Sarah's test results show that her verbal problem-solving skills are delayed, that she has a short attention span, and that she has limited language and math skills. Furthermore, she does not interact well with peers, although she has no behavioral problems.

In order to develop annual goals for Sarah, the MDT needs to assess the level at which Sarah should be functioning, given her intellectual capabilities and her chronological age. In this regard, assume that it is determined that Sarah should be performing at the kindergarten level. The MDT's next step should be to look at what is required of kindergarten children and determine which of those skills Sarah possesses or does not possess. Some examples of the tasks kindergarten children are often required to perform are:

(1) count to 10;
(2) say the alphabet;
(3) identify letters and numbers;
(4) know their address and phone number and be able to write their name;
(5) perform personal hygiene (washing, going to the bathroom, brushing teeth);
(6) share with others and
(7) participate in group activities.

Building from this knowledge, a well-informed MDT might generate the following annual goals for Sarah:

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[118] Strickland and Turnbull, *supra* note 52, at 217.

[119] *Id.* at 218.

(1) Sarah will be able to count out loud from 1-10;
(2) Sarah will recite her name and address;
(3) Sarah will correctly identify the letters of the alphabet and the numbers 1-10;
(4) Sarah will stay on a familiar learning or play task without supervision for 15 minutes;
(5) Sarah will take turns in large classroom groups with non-handicapped age peers;
(6) Sarah will talk with her peers.

After the MDT analyzes each of the skills necessary for Sarah to reach her goals, it will have to determine how many of these skills she can most likely attain in the year and then possibly set priorities among the goals.

* * *

By way of contrast, suppose another child, John, aged ten, is aggressive and has difficulty adhering to school routines. Some examples of annual goals that might be developed for John include:

(1) John will initiate interactions with his peers;
(2) John will verbalize his emotions rather than acting agressively;
(3) John will take turns in large instructional groups;
(4) John will manage his own possessions;
(5) John will follow his school schedule.

Area Two. Part Two: Short-Term Objectives

Once annual goals are written to address each area of a student's need, the goals must be broken down into short-term objectives. Such objectives should describe measurable instructional steps that build upon the student's present performance and progress toward reaching an annual goal. Once the objectives are ascertained, the teacher can develop daily instructional activities to serve as "stair steps" to reach the objectives.

Short-term objectives should describe a subskill of an annual goal, not merely restate the annual goal.[120] The objectives should be written in a sequential order that reflects a progression through the various skills needed to meet the annual goal.[121] Although short-term objectives should not be as specific as a daily lesson plan, they should describe the setting, material or behavior to be learned and the degree of proficiency that will be considered to constitute satisfactory performance. (See example in box that follows.)

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[120] Barbara Tymitz-Wolf, "Guidelines for Assessing IEP Goals and Objectives," 14 *Teaching Exceptional Children*, No. 5:198 (March 1982) at 199.

[121] *Id.*

For example, assume an annual goal for a child—Evan—is to print the letters of the alphabet. The short-term objectives for this goal might be as follows:

(1) Evan will trace all the letters of the alphabet with 80 percent accuracy.
(2) Evan will copy the lower case letters of the alphabet from a model on his paper or from the chalkboard with 60 percent accuracy.
(3) Evan will be able to copy the upper case letters of the alphabet from a model on his paper or from the chalkboard with 60 percent accuracy.
(4) Evan will arrange a written display of the letters of the alphabet in order with 80 percent accuracy.
(5) Evan will write all of the upper and lower case letters in order with ten or fewer mistakes.
(6) Evan will write all the letters from dictation with two or fewer mistakes.

The teacher could then reduce each of these six objectives into instructional lessons. For example, the teacher could break the alphabet down into two types of letters, those with curves (such as O, D, B, and C) and those made with straight lines (such as E, L, H, W, and X). The teacher could then break down the task to be performed for subsets of each type. The first lesson plans could involve Evan's tracing a letter that has already been written. Once Evan can do that, the plans could require him to trace letters that are suggested by dashes, and so on.

In developing each subskill, the MDT should specify the conceptual and/or physical material to be used and describe the subskill.[122] This requires a "careful analysis of the component skills" needed to reach the annual goals.[123] (See box below.)

If, for example, an annual goal for a child, B.J., is to learn to prepare food,[124] short-term objectives might include the following: (1) Prepare entrees using picture recipes; (2) prepare beverages from powdered or liquid mixes; (3) operate and use small kitchen appliances to make a cold prepared food; or (4) use a microwave oven to prepare or heat a commercially prepared food.

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[122] *Id.* at 199.

[123] Susan Hasazi and Robert York, "Eleven Steps to Good Teaching," 10 *Teaching Exceptional Children*, No. 3:63 (Spring 1978) (hereinafter Hasazi and York) at 64.

[124] This example is taken from Strickland and Turnbull, *supra* note 52, at 452, 453.

Area Three. Specific Education Services To Be Provided

The next aspect of an IEP involves a statement of the "specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs."[125] When considering the placement of a child, at least five points should be kept in mind. First, the child's needs and services should be determined without regard to the availability of services.[126] Second, the specific types of equipment and services required by the child should be determined. Third, placement should be planned in the least restrictive environment and with as many non-handicapped children as possible.[127] Fourth, the services required must be provided at public expense and at no cost to the parents.[128] Finally, to allow the child to participate with non-handicapped children as much as possible in all aspects of his or her education, placement in non-academic—as well as academic—settings should be considered.[129]

The following factors must be weighed when the MDT is deciding the proper placement for a handicapped child:

- the number of children in the class;
- the age of the other children in the room as well as their handicaps and special education needs, if any;
- the child's social and emotional maturity;
- the child's social or cultural background;
- the child's chronological age as well as his or her educational and grade level;
- the child's intellectual capacity;
- the child's physical condition;
- the amount of individualization of instruction available in the classroom;
- the child's adaptive behavior;

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[125] 20 U.S.C.A. §1401(19)(C) (1990).

[126] *See* Department of Education Interpretation: IEP Purpose and Requirements, 46 *Fed. Reg.* 5460 (1981), 1 EHLR 103:43, specifically question No. 44, which states, "the services must be listed in the IEP even if they are not directly available from the local agency, and must be provided by the agency through contract or other arrangements."

[127] 34 C.F.R. §300.550(b) (1988) provides that handicapped children must be educated, to the maximum extent appropriate, with children who are not handicapped, and that children should only be placed in separate classes or schooling when the severity of their disability is such that the regular class, even with the use of supplementary aids and services, could not provide an education that meets the IEP goals satisfactorily. *See also*, 34 C.F.R. §300.227(a) (1988) (LEAs must, "to the maximum extent practicable," provide "special services to enable handicapped children to participate in regular educational programs").

[128] 20 U.S.C.A. §1401(a)(18) (1990). Children are entitled to a *free* appropriate public education, which includes any related services necessary for the child to benefit from his or her education.

[129] 34 C.F.R. §300.553 (1988).

- the child's ability to cope and maintain himself or herself in a particular setting.[130]

Furthermore, the MDT should assess the services available at the school being considered, including the availability and qualifications of the staff and of other school-based resources.[131] In evaluating placement choices, the MDT should send the child to a school as close to home as possible,[132] and should arrange for as much integration as possible. The amount of time a child spends in special education services is to be dependent upon the *severity*, not the *nature*, of the child's disability.[133]

In designating the proper placement for a child, the LEA and parents should list any community services that, in addition to school district programs, might be helpful. The child should be provided an opportunity (at the parents' discretion) to be involved in social groups, such as Boy Scouts and Girl Scouts, athletic teams, and the like. Community activities, as well as extracurricular activities provided by each school, can provide potential assistance to the child in meeting both academic and social goals.

The school district must make available a continuum of alternate placements for handicapped children.[134] A child is to be placed in the least restrictive environment (within that continuum) from which he or she can benefit educationally (with the potential of moving to a less restrictive environment in the future).[135] A hierarchy of placements from least restrictive to most restrictive follows:

1. regular education classroom with a special education consultant;
2. regular education classroom with itinerant teacher;
3. regular education classroom with resource room;
4. part-time special education classroom in public school building;
5. full-time special education classroom in public school building;
6. special education day school;
7. residential school;
8. institution.

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[130] Chalfant and Pysh, *supra* note 104, at 61-62.

[131] *Id.* at 63.

[132] *See* 34 C.F.R. §300.552(a)(3) (1988). *See also*, 34 C.F.R. §300.552(c) (1988), which provides: "Unless a handicapped child's individualized education program requires some other arrangement, the child [shall be] educated in the school which he or she would attend if not handicapped . . . ."

[133] Chalfant and Pysh, *supra* note 104, at 63. Note, however, that to the extent that it is appropriate for a student to receive an integrated education placement, even the severity of the disability would not cause the child to leave the regular education setting. For a more detailed discussion of mainstreaming and integration, *see* chapters 13 and 16 of this text.

[134] *See* 34 C.F.R. §300.551 (1988).

[135] Laura F. Rothstein, *Special Education Law* (Longman, White Plains, New York, 1990) at 113.

Home instruction is also a restrictive placement alternative; it fits somewhere between "special education day school" and "institution."

A child should not be assigned to a strictly special education class, day school, or residential facility unless "the nature and severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."[136] Whenever possible, the child should be integrated with non-handicapped children.

In evaluating a child's needs, the MDT should review the child's entire school day. The MDT should attempt to place the handicapped child in as many regular education classes and activities (academic and nonacademic) as possible.[137] Most children can and should be mainstreamed for activities such as meals, recess, physical education, homeroom, library, art and music. When it is not appropriate to integrate a child in a specific academic area (such as math or language), allowing the child to interact with non-handicapped peers at other times of the day is likely to enhance the student's socialization skills. In addition, integration, when properly accomplished, will often help non-handicapped students better understand and learn about their peers, decrease fears other students may have about disabilities, and lead to greater acceptance of handicapped children in regular education programs.

The MDT must also consider the services, materials or tools that may be necessary for placement in a particular program. The child may, for example, need a computer, touch board, augmentative communication device, wheelchair, hearing aid, braille material and equipment, or accessible bathroom and water fountain. The child may also need a notetaker, counseling, occupational therapy, physical therapy, psychological services, speech services, family counseling or special transportation. The MDT should be sure the parents are aware of all the services available, especially family counseling and support groups for parents of handicapped children, but should not impose these outside services on the parents.

Area Four. Initiation Date and Anticipated Duration

This aspect of the IEP requirements provides a safeguard against waiting lists and unnecessary delays. An IEP must be implemented as soon as possible after the IEP meeting.[138] If the IEP is developed in the summer or during a vacation period, however, or if circumstances develop that may require a short delay (such as a need to arrange for special transportation), this period can be extended.[139]

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[136] *See* 34 C.F.R. §300.550(b)(2) (1988).

[137] Martin, *Educating Handicapped Children, supra* note 86, at 82.

[138] 34 C.F.R. §300.342(b)(2) (1988).

[139] Comment to 34 C.F.R. §300.342 (1988).

There should be an initiation date for each of the services specified on the IEP. This date should help the LEA be ready for the service activity that is to follow completion or conclusion of a prior objective or goal.[140]

The MDT must review the goals and objectives sought to be attained through the services provided and use its best judgment to determine the period for which it anticipates the services will be necessary. One decision that must be made in this regard is whether the child requires a ten- or twelve-month school plan. Since the period of time required to reach a short-term objective will—in most instances—be an estimation, the duration might be better described in terms of the child's progress ("the service will be provided until the child reaches the specified objective upon which the service is premised," for example) or written in terms of review periods. Because a review must be held at least annually, many IEPs list a duration date for goals that is one year after the initiation date of services.

Whenever a child attains a goal or objective sooner than anticipated, however, or requires other services, the IEP must be altered—with the consent of the parents. In such a situation, the MDT must meet and modify the IEP to effectuate the changes.

Area Five. Objective Criteria and Evaluation Procedures

Evaluation criteria should be incorporated into the IEP as part of the short-term objectives in order to determine when an objective has been met and to monitor the child's progress toward the annual goal. Arbitrary selection of the evaluation criteria, however, may result in an inappropriate—or unrealistic—expectation and evaluation of the child's progress.[141] Thus, the MDT must be careful to assign a level of proficiency and a tool for measuring it that can accurately assess each type of progress.

Since the principle requirement of the EAHCA is to provide an appropriate education, such an evaluation of short-term objectives reached is critical. The best strategy for determining if an educational program is appropriate involves monitoring the student's progress through objective—rather than subjective—criteria.[142] As one commentator has stated, "[u]nless criteria are specified, evaluation becomes open to the subjectivity of the evaluator. If criteria are not stated, it will be difficult, if not impossible, to tell when the objective has been achieved."[143]

In considering the proper evaluation procedure to be applied, the MDT must look at the nature of each short-term objective and decide how it can best be measured. Accuracy rates, time requirements and the number of times a child completes a task are good specific factors that can be utilized as measurement criteria. The objective should be stated in the form of observable behavior for ease of monitoring and minimization of subjectivity.

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[140] Martin, *Educating Handicapped Children, supra* note 86, at 83.

[141] Strickland and Turnbull, *supra* note 52, at 249.

[142] *See* chapter 16 of this text, *supra*, for a discussion of appropriateness.

[143] Strickland and Turnbull, *supra* note 52, at 249.

A second factor to be considered in determining the proper evaluation criteria is the difficulty in performing the objective. The criteria should be set so that the child can be expected to meet the objective within a reasonable time frame and move forward to the next step (or short-term objective) en route toward reaching the annual goal. (See examples in box below.)

In the previous listing of Evan's short-term objectives, for example, two different criteria were incorporated. Earlier objectives used a "percent accuracy" measure. In utilizing that criterion, the teacher would examine some of Evan's written work and count the number of letters that were correctly traced or copied, depending on the particular objective being considered. The proportion between correct letters and the total number written would show how "accurately" Evan had performed.

Later in the sequence of Evan's short-term objectives, the criterion changes to the number of mistakes. This measure corresponds directly to an anticipated improvement in Evan's overall skill level. Both measures, however, are reasonable means of determining concretely how well Evan is doing in reference to a specified objective.

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With respect to B.J.'s beverage or food preparation goal, the most pertinent measure might be the number of picture recipe steps B.J. is able to follow in the preparation of an item. A second criterion, used to measure the success in using appliances, microwaves or stoves, might check the extent to which B.J. has adhered to a set of safety rules specific to each appliance.

This aspect of the IEP is probably the one with which there is the least substantive compliance. Nevertheless, since the regulations provide that an evaluation must occur at least annually,[144] all short-term objectives should be written in such a manner that they can be tracked.[145]

Unless the function of measurement is an integral part of the instructional plan, the team will be unable to determine the success or failure of the current IEP.[146] It is important that both the LEA and the parents be able to monitor the student's progress so that they can determine whether the goals and objectives of the child's IEP are being met. If the child is not attaining the short-term objectives or goals set forth in the IEP, obviously that plan is not appropriately addressing the child's needs, as required by the Act.[147] Thus, a new plan should be established.

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[144] 34 C.F.R. §300.343(d) (1988).

[145] *See* Sivasailam Thiagarajan, "Individualizing Instructional Objectives," 12 *Teaching Exceptional Children*, No. 3 (Spring 1980) at 126.

[146] Hasazi and York, *supra* note 123, at 65.

In sum, it must be remembered when developing an IEP that each IEP is a document custom-made for a student with a disability. It is a *personalized* plan that must attempt to provide an appropriate education for that child in the least restrictive environment possible. At the same time, it must be drafted so that—aside from describing the resources to be provided—it can serve as a management tool, a compliance and monitoring document and an evaluation device.[148] Finally, the IEP must be prepared with the student's future in mind and with the ultimate goal of developing a productive citizen who will live and work with us in our community.

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[147] A child is entitled to receive an appropriate education that allows him or her to benefit from instruction, *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982), 1981-82 EHLR 553:656. *See also*, 20 U.S.C.A. §1401(18) (1990) and 34 C.F.R. §300.4 (1988).

When a child is not attaining the objectives that are set forth in the IEP, it is likely that his or her education is not appropriate. Although the LEA and teacher are not accountable for the success of a child, they must ensure that the prescribed services are provided. [34 C.F.R. §300.349 (1988) and comment following]. If a child is being provided with the services designated in the IEP and yet is still not succeeding, the MDT should reconvene, reevaluate the child and the IEP, and develop a new plan that allows the child to benefit sufficiently from the educational program provided.

[148] Department of Education Interpretation: IEP Purpose and Requirements, 46 *Fed. Reg.* 5460 (1981), 1 EHLR 103:43, specifically Parts d-f.

19

Disabled Newborns

I. Introduction

Since at least 1973 there has been a national debate over the moral and legal obligations owed to infants born with mental or physical disabilities. This issue gained much attention following two well-publicized cases involving a child with Down Syndrome who died from lack of life-prolonging treatment in Bloomington, Indiana in 1982,[1] and a mentally retarded infant with spina bifida who was denied life-saving treatment in New York in 1983.[2] The crucial question to be answered is: to what extent, if any, may parents and/or medical authorities withhold medical treatment or nourishment from disabled infants?[3] Stated another way, when, if ever, may parents and/or medical authorities choose to let disabled infants die rather than to provide such infants with sufficient medical treatment or nourishment to sustain life? The answer to this question involves examination of several issues.

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[1] *In re Infant Doe*, No. GU 8204-004A (Monroe County, Circuit Court April 12, 1982), *petition for writ of mandamus and prohibition denied sub nom. State ex rel Infant Doe v. Monroe Circuit Court*, No. 482 S140 (Ind. April 14, 1982), *appeal dismissed sub nom. In re Infant Doe*, No. 1-782A157 (Ind. Ct. App. Feb 3, 1983), *cert. denied* 464 U.S. 761 (1983), reprinted in 2 *Issues in Law and Medicine* 77 (1986).

[2] *United States v. University Hospital, State University of New York at Stony Brook*, 729 F.2d 144 (2d Cir. 1984).

[3] The United States Commission on Civil Rights recently concluded, on the basis of (1) surveys of health care personnel; (2) an analysis submitted to the Commission by Professor H. Rutherford Turnbull (professor of Special Education and Law at the University of Kansas); (3) the results of investigative reporting; (4) the testimony of disabled persons and their relatives; and (5) "the repeatedly declared views of physicians set forth in their professional journals," that there continues to be a

First, what policy considerations are relevant when making a determination as to whether a disabled infant should live or die? Why would parents or medical authorities *want* disabled infants to die rather than to live? Are there valid reasons in support of death, rather than life, for some disabled infants? Whose interests would be furthered by such a decision: The infant's? The parents'? Members of the infant's collateral family? Society at large?

Second, what, if any, are the constitutional ramifications of such a decision? Do disabled infants have a constitutional right to live? Do parents have a constitutional right to determine the fates of their disabled infants? What role, if any, does the government play in the decisionmaking process?

Third, to what extent does federal law impact on this decision? Do federal laws protect the rights of any or all of the parties involved (the infants, their parents, the medical authorities)?

This chapter will address all of these issues.

II. Policy Considerations

A. Quality of Life

Debates about the appropriate care and treatment of infants born with handicaps usually involve discussions about the prospect of a particular infant's overall quality of life. Proponents of the parental right to choose death for their disabled infant argue that it is in the best interest of the child to spare the child a life of unacceptably poor quality. Opponents of the parental right to choose death for their disabled infant argue that the majority of disabled people themselves reject the quality of life analysis. The arguments on both sides are complex, and involve a multitude of collateral concerns.

Proponents of the poor quality of life theory operate from the basic premise that the lives of many severely disabled newborn children constitute fates worse than death. Generally, the examples given by quality of life proponents involve profoundly brain-damaged children who are kept alive by constantly improving technology at great expense but who are purportedly unable to "appreciate any of the joys of living."[4] According to a 1989 report by the U.S. Commission on Civil Rights, however, the majority of persons with disabilities claim that they *do* appreciate the joys of life, and would not, as a disabled person, choose death over

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widespread practice of denying lifesaving treatment to children with disabilities. U.S. Commission on Civil Rights, Medical Discrimination Against Children with Disabilities at 110 (September 1989) (hereinafter U.S. Commission on Civil Rights).

[4] Frost, "Treatment of Seriously Ill and Handicapped Newborns," 2 *Critical Care Clinics* 149, 153 (1986).

life.[5] Part of the problem in attempting to compare and analyze the competing viewpoints is that the two groups often focus upon and address two distinct populations. Opponents of the parental right to choose death are concerned about those persons who have accommodated to their disabilities and achieved at least minimally acceptable qualities of life. Quality of life proponents, on the contrary, focus upon multiply-disabled newborns who often have limited expected life spans (frequently measured in days or weeks) with a dismal prognosis. Proponents of a policy that says life is always preferable to death are concerned that once exceptions are made for some infants based upon the existence of disabilities, there is no assurance that societal stereotypes, prejudices and biases will not play a significant part in the process of determining who lives and who dies. It is this subjectivity, and the potential for unfettered eugenics, that underlies the adherence to a clear line by "life always" proponents.

Rather than looking at the problem from a "medical" quality of life approach, which purportedly focuses on the inabilities of disabled people to perform in certain aspects of life, disabled adults tend to look at the problem in sociopolitical terms.[6] The sociopolitical approach focuses on the attitudes of society towards people with disabilities. Some disabled people and their advocates argue that the greatest barriers facing people with disabilities are not the physical barriers caused by the disabilities, *per se*, but the attitudinal barriers created by society at large. As one commentator has noted:

> The issue is rights, but the issue is not the right to die. It is the right to live in a society that wants you. And it's easier for society to get rid of these kinds of people right at the start than to deal with *why* life is so horrible for these people. Our society is what makes it horrible. We have the power to change that.[7]

Opponents of the poor quality of life rationale contend that, rather than allowing disabled infants to die, society must change its negative and outmoded attitudes about disabled people. The theory is that society can change its physical and emotional environment so that life in this country is comfortable for both disabled and non-disabled persons. The underlying premise behind this theory is that since an individual's quality of life is directly based on environmental factors created by society, if the concern is for the child's quality of life, the focus should be on altering those environmental factors rather than on eliminating the child.

Frequently expressed criticisms about the poor quality of life rationale are that decisions about the potential abilities of disabled children, or lack thereof, are usually made by doctors who: (a) often have received little training in the area of mental and physical disability and are unable to render educated opinions about such matters; (b) may be making such decisions based on false stereotypes about the capabilities of disabled people; (c) may be subjectively evaluating the value of a disabled child's life based on unintentional but ingrained prejudices about disabled people; or (d) may be making such decisions based upon the wealth or education of a disabled child's parents or the socioeconomic environment in which the child's family resides. Indeed, sometimes decisions as to whether to allow a disabled newborn to live or die are influenced by a quality of life formula that is entirely non-medical in character.

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[5] U.S. Commission on Civil Rights, *supra* note 3, at 32-33.

[6] *E.g.*, Hahn, "Public Policy and Disabled Infants: A Sociopolitical Perspective," 3 *Issues in Law and Medicine* 3, 3-4 (1987) ("Whereas the medical approach concentrates on inabilities affecting individual performance, . . . the sociopolitical perspective emphasizes the social environment and the importance of cultural expectations").

[7] "Killing Babies: Left and Right," *The Disability Rag*, 2, 6 (Avocado Press, May 1983).

An example of such a formula is the one utilized by Oklahoma Children's Hospital when determining whether to recommend infants with myelodysplasia for beneficial medical care. The formula utilized is stated as follows: $QL = NE \times (H+S)$. "QL" represents quality of life; "NE" represents the patient's natural physical and intellectual endowment; "H" represents the contribution from home and family; "S" represents the contribution from society.[8] Thus, the Oklahoma medical team's decisions as to whether children with myelodysplasia should live or die were premised on such non-medical factors as the family's wealth, the socioeconomic environment in which the child lived, and the child's intellectual ability. Finally, it is contended that doctors' predictions about the poor quality of life to be led by disabled infants are often inaccurate, and are later proven to be wrong.[9]

On the other hand, proponents of the parental right to allow their disabled newborns to die argue that medical recommendations for non-treatment of seriously ill disabled newborns are premised in large part on "[c]onsiderations of suffering, especially the suffering that will accompany treatment and that may only be prolonged through treatment. . . ."[10] In a survey of seven nationally prominent pediatricians, all but one (C. Everett Koop, past Surgeon General of the United States) agreed that in some cases medical treatment for disabled newborns is in itself harmful or causes harm to such infants "by prolonging what will be an intolerable existence."[11] Those doctors[12] were "convinced that a detriment-benefit analysis of treatment options for severely defective newborns occasionally indicates that such infants will be harmed on balance if treated."[13] Indeed, four of the doctors[14] indicated "that medical treatment can 'brutalize' an infant, inflict 'cruelty' on an infant, or place an infant in a medical condition that is worse than if treatment had been withheld."[15] One commentator cites an example of a child with Tay-Sachs disease[16] who requires intestinal surgery to correct a life-threatening intestinal blockage.[17] The author notes that the requisite surgery "would repair the blockage, enabling [the infant] to live for perhaps a year or two until the inevitable, prolonged and agonizing death of Tay-Sachs ends [the infant's life]."[18]

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[8] Note, "Suit Filed in Oklahoma Alleging Twenty-Four Infants Died After Being Denied Beneficial Medical Treatment." 1 *Issues in Law and Medicine* 321, 322 (No. 4, 1986).

[9] Several vivid examples are described in the U.S. Civil Rights Commission's *Medical Discrimination Against Children with Disabilities*, *supra*, note 3, 39-43 (September 1989). In one highly publicized case parents of a baby born with spina bifida were told that the child would not develop any cognitive skills, would not achieve "any meaningful interaction with her environment, nor ever achieve any interpersonal relationships," and that the child would be severely retarded, epileptic, paralyzed from the waist down, bedridden and in constant pain. *Id.* at 40. At the age of 4, however, the child was able to have meaningful relationships with her parents and friends, was attending school in a wheelchair, was communicating intelligently with others, and was *not* in pain. *Id.* at 41.

[10] Robert F. Weir, *Selective Nontreatment of Handicapped Newborns: Moral Dilemmas in Neonatal Medicine* 86 (Oxford University Press 1984) (hereinafter Weir).

B. Rights of Others

To some extent there may be competing interests involved in the determination of whether a disabled infant should live or die. For instance, in some respects the needs of a disabled child's parents may conflict with the needs of the child. First, because parents of seriously disabled infants will necessarily have to observe any suffering their child is forced to endure during the child's lifetime, and because caring parents will share their child's suffering, the parents have a strong personal interest in deciding whether to keep their child alive at all costs. Thus, it has been stated that

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[11] *Id.*

[12] In addition to Dr. Koop, the doctors surveyed included Raymond Duff of Yale-New Haven Hospital; Anthony Shaw of the University of California, Los Angeles and the City of Hope Hospital; John Larber, a pediatric surgeon at Sheffield, England; John Freeman of Johns Hopkins School of Medicine; R.B. Zachary, a pediatric surgeon at Sheffield, England; and Norman Frost of the University of Wisconsin School of Medicine.

[13] Weir, *supra* note 10, at 86.

[14] The four doctors are Doctors Duff, Shaw, Freeman and Zachary.

[15] Weir, *supra* note 10, at 86.

[16] Tay-Sachs disease is described as follows:

> Tay-Sachs is an inherited metabolic disorder found predominantly in persons of Ashkenazic Jewish descent. A Tay-Sachs baby may appear normal at birth, but within a few months develops some degree of motor weakness. As muscle tone deteriorates, Tay-Sachs infants will develop difficulty in swallowing, followed by increasing paralysis, spasticity, deafness, blindness, and convulsions. By age two or three, they become virtually vegetative, and they die by age four or five. Because these infants will get recurrent infections, treatment decisions may involve artificial respiration, resuscitation, or aggressive use of antibiotics.

N. Rhoden, "Treatment Dilemmas for Imperiled Newborns: Why Quality of Life Counts," 58 *Southern California Law Review* 1283, 1292 (1985).

[17] Stephen A. Newman, "Baby Doe, Congress and the States: Challenging the Federal Treatment Standard for Impaired Infants," 15 *American Journal of Law and Medicine* (No. 1) 1, 4 (hereinafter Newman).

[18] *Id.*

> [T]he interpreter of last resort in this particular ordeal is the conscience of suffering parents wracked by the suffering of their child. Into their private chamber of personal agony and decision, only the most presumptuous among us would dare to tread.[19]

In addition, parents have an interest in the welfare of their family as a whole, and may view the needs of a disabled infant as being so expensive and time consuming as to interfere with the family's financial welfare, the welfare of other children in the family, and their own desire to be free of the extra efforts involved in caring for a disabled child as well as to avoid the societal stigma to the family unit that often results when one family member is disabled.

Further, there may be competing interests between the desires of society at large and the needs of the disabled child. Society as a whole would prefer not to be burdened with people who are "different"; it would rather not sustain the financial costs involved in accommodating disabled people in the employment, transportation, housing and social services areas. It is argued that in allowing severely disabled children to die we run the risk that the interests of others (parents or society) will be the prime determiner (albeit subconsciously) of preserving life or permitting death. The focus under such circumstances would not be on the patient's welfare, but rather on the impact of the disabled child's continued life upon others. In response to this argument, some quality of life advocates counter that to treat children with severe disabilities in a different fashion than other patients is in fact more humane and tied to the individual child's best interests, and thus is more logical than blind adherence to a philosophical principle that ignores the realities of the particular child's existence. The ultimate legal question, however, is whether such different treatment of disabled infants constitutes impermissible discrimination in our society.

III. Federal Constitutional Rights

Where a disabled infant is denied treatment at a state or federally operated or funded hospital, constitutional questions come into play because the questioned conduct is being carried out by agents of the government.[20] The major constitutional questions at issue are as follows:

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[19] *CBS Evening News with Dan Rather* 13 (CBS television broadcast, Nov. 10, 1983) (editorial commentary by Bill Moyers), reprinted in *Newman, supra* note 17, at 1.

[20] A discussion of the "state action" doctrine is beyond the scope of this book. For purposes of this chapter it is sufficient to state that the United States Constitution prohibits federal or state agents from acting in an unconstitutional manner towards any member of this country. The Constitution, however,

A. Rights of Infants

1. Equal Protection of the Law

Disabled infants who are denied medical treatment or nourishment accorded non-disabled infants are being treated in a non-equal manner. Such non-equal treatment on the part of the government may be held prohibited by the Fourteenth Amendment to the United States Constitution.[21]

As previously explained in this text,[22] the Supreme Court ruled in *City of Cleburne v. Cleburne Living Center*[23] that mental retardation is not a "quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation,[24] and it is likely that physical disability will also be denied quasi-suspect classification.[25] Any equal protection challenge to medical treatment decisions relating to disabled infants premised on the infant's status as disabled, therefore, will be analyzed under the traditional "rational basis" test.[26] The United States Constitution, however, guarantees every individual the right to life and liberty.[27] Thus, the right to life and consequential

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does not require that private persons act in a specific manner towards others. Thus, when a disabled infant is denied treatment at a private hospital or facility which receives no governmental funding, constitutional issues are not involved.

The U.S. Commission on Civil Rights offers the following list of persons and entities whose actions are subject to constitutional challenge:

> (1) Federal, State and local hospitals and their employees (including staff physicians when their decisions are governed by hospital policy), even though the action is taken at the request of the parents; (2) State and local child protective agencies; (3) Federal, State and local agencies charged with the enforcement of laws prohibiting discrimination on the basis of disability; and (4) State and Federal courts.

U.S. Commission on Civil Rights at 101, *supra* note 3, (footnotes omitted). *See* that report for a more comprehensive discussion of this issue. It should be noted, however, that, as stated by the Commission, "substantial government funding or regulation of an institution, program, or activity will not transmute what is otherwise a private decision into one which 'may be fairly treated as that of the state itself.' The key is whether the decisionmaker is acting in his or her private capacity." *Id.* (footnotes omitted).

[21] The Fourteenth Amendment to the United States Constitution provides, *inter alia*, that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

[22] *See* chapter 2 of this text, *supra*.

[23] 473 U.S. 432, 105 S. Ct. 3249 (1985).

[24] 473 U.S. at 442, 105 S. Ct. at 3255.

[25] *See* chapter 2 of this text at section II, *supra*.

[26] *See* chapter 2 of this text at section II, *supra*.

[27] The Fourteenth Amendment to the Constitution provides, in relevant part, that no State shall "deprive any person of life, liberty, or property, without due process of law." Moreover, the Preamble to the Constitution provides that the Constitution was established, *inter alia*, to "secure the Blessings of Liberty to ourselves and our Posterity. . . ."

liberty are dispositive fundamental rights, and any denial of those fundamental rights should logically be analyzed under the more rigorous "strict scrutiny" test.[28] To date, however, no cases have been found in which this argument has been made.

Even under the less demanding rational basis test, however, representatives of disabled infants seeking administration of medical treatment or nourishment might prevail in some cases on a claim that governmental denial of medical treatment or nourishment necessary to sustain life violates the equal protection clause. In *City of Cleburne*, despite its refusal to label mentally retarded people a quasi-suspect class, the Court prohibited the application of a city ordinance requiring operators of a group home for mentally retarded persons to obtain a special use permit.[29] Although purporting to apply traditional rational basis principles, the Court closely scrutinized the ordinance at issue, and carefully looked behind the stated "legitimate" purposes for the ordinance to conclude that the underlying premise for the discriminatory treatment afforded the Cleburne Living Center was "an irrational prejudice against the mentally retarded. . . ."[30] The Court clearly evidenced its intent to prohibit the application of seemingly neutral laws, rules or policies that are based on misconceptions and prejudices about disabled people. Thus, as stated by the U.S. Commission on Civil Rights:

> [W]hen medical care decisionmaking is based on little more than personal experience and hearsay regarding the capabilities and problems of persons with disabilities and their families — that is, on deeply ingrained stereotypes that relegate persons with disabilities to a perpetually subordinate status — there can be no question that the equal protection clause forbids government action that either rests on such stereotypes or affirms them.[31]

Because the fundamental right to life is at issue in this type of situation, presumably an even more exacting standard of review might be applied than the test applied in *Cleburne*, thereby giving even greater protection under the equal protection clause to disabled newborns. Generally, however, the right to life argument has been made in the context of a due process claim rather than an equal protection claim, as discussed below.

2. Procedural Due Process

Under the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution, the rights to life, liberty, or property cannot be abridged without due process of law.[32] Due process of law requires that certain procedural protections must be provided before the government may deprive any person of life, liberty, or property.[33] At a minimum, therefore, a disabled child who is denied food, water, or medical care, and is thus deprived of the potential for life and liberty, is entitled to such procedural protection.

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[28] *See* chapter 2 of this text at section II, *supra*.

[29] *See* chapter 2 of this text at section II, *supra*.

[30] 473 U.S. at 450, 105 S. Ct. at 3260.

[31] U.S. Commission on Civil Rights at 97.

In *Mathews v. Eldridge* the Supreme Court held that the type of procedural protection that must be provided under the Constitution is determined by weighing the following factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[34]

The United States Civil Rights Commission has interpreted this statement as requiring "careful and informed evaluation of each case by independent and disinterested decisionmakers. . . ."[35] According to the Commission, the record shows that: (a) "the risk of erroneous determinations regarding the nature and extent of future disability is extremely high"; and (b) "children have been deprived of treatment based on both uninformed and biased medical advice."[36] Thus, the Civil Rights Commission takes the position that, at a minimum, before a disabled infant may be denied medical treatment, food or water necessary to sustain life and liberty, an impartial hearing must be conducted at which potential advocates of the child must be "given adequate opportunity to present the case for providing care that children without disabilities would be provided as a matter of course."[37]

One court, however, while recognizing that disabled infants who have been denied medical care may have a viable claim through their advocates under the due process clause, held that due process does not require such impartial hearings. In *Johnson v. Sullivan*[38] the plaintiffs contended that the Oklahoma Children's Memorial Hospital improperly refused to provide infants born with myelomeningocele with necessary medical care, but instead made the decision to allow 24 such infants to die. The plaintiffs contended that since the hospital was "a state owned and run facility, procedural due process would require a hearing in which the infants would be represented [prior to the decision], or at least a review of the decision by a neutral factfinder."[39] Because no such safeguards were provided by the hospital, the plaintiffs contended that the due process clause had been violated. The hospital filed a motion to dismiss the plaintiffs' constitutional claims, and the motion was denied by the court.[40] Subsequently, however, the court concluded, "I cannot myself think of any due process that would be required other than obtaining parental consent."[41] Because the parents consented to the decision to allow their disabled infants to die, the court found that the due process clause had not been violated.[42]

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[32] The Fifth Amendment provides, in relevant part: "no person shall be deprived of life, liberty, or property, without due process of law. . . ."

The Fourteenth Amendment provides, in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

[33] *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976).

[34] 424 U.S. at 335, 96 S. Ct. at 903.

[35] U.S. Commission on Civil Rights, *supra* note 3, at 97.

[36] *Id.* at 97-98.

[37] *Id.* at 97.

[38] No. Civ. 85-2434 A (W.D. Okla., filed October 3, 1985).

B. Rights of Parents

1. Right to Privacy

The Supreme Court has recognized a generalized right to "privacy" in the form of individual autonomy or liberty relating to matters uniquely important to the course of an individual's life, such as sex, marriage and childbearing.[43] The right to refuse medical treatment for oneself or others is held to be encompassed within this broad "privacy" concept.[44] Thus, in *American Academy of Pediatrics v. Heckler*[45] the court noted that where a regulation "is read to eliminate the role of the infant's parents in choosing an appropriate course of medical treatment," in some cases the regulation (or policy) might infringe upon the parents' privacy rights.[46]

The privacy rights of parents are not carved in stone, however. Where important state and child issues are at stake, such as in situations where the life, qualified" could not be applied in the comparatively fluid context of medical treatment decisions without distorting the plain meaning of that term.

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[39] Note, "Suit Filed in Oklahoma Alleging Twenty-four Infants Died After Being Denied Beneficial Medical Treatment," 1 *Issues in Law and Medicine* (No. 4) 321, 327 (1986) (hereinafter "Suit Filed in Oklahoma"). The plaintiffs relied on *Parham v. J.R.*, 442 U.S. 584, 99 S. Ct. 2493 (1979).

[40] Order of June 22, 1987, *Johnson v. Sullivan*, No. CIV-85-2434-A (W.D. Okla., filed October 3, 1985). *See* "Johnson v. Sullivan," 4 *Issues in Law and Medicine* (No. 1) 123, 125 (1988).

[41] *Johnson v. Sullivan*, No. CIV-85-2434-A (W.D Okla., Transcript of Trial Proceedings, January 31, 1990) 593.

[42] *Id.* at 594.

[43] *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973) (autonomy to choose abortions); *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678 (1965) (autonomy to use birth control). This right of individual autonomy is found generally in the due process clause of the Fourteenth Amendment. *Id.*

[44] For a comprehensive discussion of this subject, *see, e.g.*, U.S. Commission on Civil Rights at 98.

[45] 561 F. Supp. 395, 403 (D.D.C. 1983).

[46] *Id.* (dictum).

Second, the circuit court held that the infant could not be held to have been subjected to discrimination. The court reasoned that where the handicapping condition is related to the condition to be treated, it would rarely, if ever, be possible to say with certainty that a handicapped infant was subject to discrimination. The majority opined that Congress never contemplated that Section 504 would apply to treatment decisions involving handicapped newborn infants. Finally, the majority ruled that the hospital treated Baby Jane Doe in an even-handed manner in that it would have performed the treatment had the parents consented, and that to require the hospital to undertake the surgery without parental consent would have imposed a particularly onerous affirmative action burden upon the hospital.

Judge Winter, dissenting to the Second Circuit's ruling, argued that a

> judgment not to perform certain surgery because a person is black is not a bona fide medical judgment. So too, a decision not to correct a life threatening digestive problem because an infant has Down's Syndrome is not a bona fide medical judgment. The issue of parental authority is also quickly disposed of. A denial of medical treatment to an infant because the infant is black is not legitimated by parental consent.[67]

The majority rejected Judge Winter's reasoning.

Subsequent to the Second Circuit's decision in *Stony Brook*, the American Hospital Association, the American Medical Association and others challenged the four major components of DHHS's final rule.[68] The plaintiffs alleged that DHHS lacked authority under Section 504 to implement the rules. The district court, relying on *Stony Brook*, agreed, and the Second Circuit affirmed.[69] Finally, in a well-publicized plurality decision in the *Bowen* case, the Supreme Court affirmed.[70]

In *Bowen* a plurality of the Court held that the regulations promulgated by DHHS exceeded the scope of Section 504. The Court held that a hospital's withholding of treatment from disabled infants in accordance with parental instruction does not necessitate federal regulation. The plurality reasoned that, when parents have not consented to treatment, the hospital has not violated Section 504 in withholding such treatment. In the absence of parental consent for treatment, the hospital has not denied an infant care solely by reason of his disability as prohibited by Section 504. Because there was no evidence that hospitals had refused treatment authorized by parents or by court order, the regulations were not needed to prevent hospitals from denying treatment to disabled infants. Justice Stevens, writing for the plurality, stated that "[a] hospital's withholding of treatment when no parental consent has been given cannot violate [Section] 504, for without the consent of the parents or a surrogate decisionmaker the infant is neither 'otherwise qualified' for treatment nor has he been denied care 'solely by reason of his handicap.' "[71]

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[67] 729 F.2d at 162.

[68] *See, Bowen v. American Hospital Association*, 476 U.S. 610, 106 S. Ct. 2101 (1986).

[69] *American Hospital Association v. Heckler*, 585 F. Supp. 541 (S.D.N.Y.), *aff'd*, 794 F.2d 676 (2d Cir. 1984), *aff'd sub. nom., Bowen v. American Hospital Association*, 476 U.S. 610, 106 S. Ct. 2101 (1978).

[70] *See* notes 68 and 69, *supra*.

A second question at issue in *Bowen* was whether Section 504 requires hospitals to report (to the government) parents' refusals to consent to treatment for their disabled infants. The Court answered that question in the negative. The plurality held that Section 504 imposes no duty to report instances of medical neglect. Rather, any such duty derives from state law or a hospital's own voluntary practice.

Finally, the Court addressed the question of whether Section 504 authorizes the Secretary of DHHS to order state agencies to require hospitals to prevent medical neglect of disabled infants. The DHHS regulations effectively labeled medical neglect of disabled infants a state investigative priority. The Court held that while the Secretary of DHHS could require state agencies to document their own compliance with Section 504, nothing in Section 504 authorized the Secretary to order state agencies to enforce compliance by other recipients of federal funds, such as hospitals.

The plurality's decision that hospitals do not violate Section 504 by following parental wishes to withhold medical treatment from disabled infants has been widely criticized. In a dissenting opinion in *Bowen*, Justices White and Brennan stated:

> [T]he parental consent decision does not occur in a vacuum. In fact, the doctors (directly) and the hospital (indirectly) in most cases participate in the formulation of the final parental decision and in many cases substantially influence that decision. Consequently, discrimination against a handicapped infant may assume guises other than the outright refusal to treat once parental consent has been given. Discrimination may occur when a doctor encourages or fails to discourage a parental decision to refuse consent to treatment for a handicapped child when the doctor would discourage or actually oppose a parental decision to refuse consent to the same treatment for a nonhandicapped child. Or discrimination may occur when a doctor makes a discriminatory treatment recommendation that the parents simply follow. Alternatively, discrimination may result from a hospital's explicit laissez-faire attitude about this type of discrimination on the part of doctors.[72]

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[71] 476 U.S. at 630, 106 S. Ct. at 2114. Of course, because parents, as opposed to hospitals, are not recipients of federal financial assistance, parents are not covered by section 504 and thus cannot be charged with violating that Act.

[72] 476 U.S. at 658-59, 106 S. Ct. at 2129 (White & Brennan, JJ., dissenting).

Similarly, two commentators, Professors James Ellis and Ruth Luckasson, made the following statement about the plurality's decision:

> The *Bowen* decision is profoundly disappointing. The Justices joining the plurality opinion appear to view the discriminatory withholding of treatment as a non problem for which no solution is necessary or appropriate. This approach ignores reality. We know that infants are denied treatment solely on the basis of their handicap. We know that these actions often take the form of brutal indifference to the lives and health of these children. We know that parents are often misled about the nature of their child's disability and the prospects for the child's future. The result is children who are "allowed" to die or whose disability is aggravated by failure to provide necessary treatment.
>
> This problem does not occur in a vacuum. The issue arises in a society that has demonstrated profound ambivalence about the lives of people with handicaps and their appropriate role in our society. The public debate on this issue has seen numerous suggestions that people with handicaps are less than human, including reports of offensive references to individuals with disabilities as "vegetables." The same kinds of false stereotypes and invidious discrimination that led the city of Cleburne, Texas to attempt to exclude group homes for citizens who have mental retardation produces the conclusion that the lives of mentally retarded citizens lack any "quality" and are therefore not worth living.[73]

Finally, the U.S. Commission on Civil Rights has stated:

> A central problem with the *Bowen* plurality opinion is that it suggests that [S]ection 504 puts no constraints on a Federal financial assistance recipient's discriminatory denial of treatment to a person with a disability if the denial is authorized by a nonrecipient such as a parent who, as a surrogate decisionmaker for a child with a disability, normally has the legal authority to provide or withhold consent for the child's medical treatment. . . . In the view of the Commission, a recipient of Federal financial assistance should not be able to escape the requirements of [S]ection 504 simply by persuading or encouraging a nonrecipient to authorize what, but for the nonrecipient's involvement, would be prohibited discrimination. A recipient's substantial involvement in a nonrecipient's discriminatory practice should be held to violate [S]ection 504.[74]

Despite these criticisms, to date Section 504 has not been held to require medical intervention for disabled infants. It is important to note, however, that in *Bowen* the plurality of the Court, noting that the *Bowen* case involved a challenge to the rules promulgated by DHHS rather than an enforcement action in a particular case, declined to rule on the question of whether Section 504 "ever applies to individual medical treatment decisions involving handicapped infants."[75] Presumably, if a situation arose in which medical treatment of a disabled infant were authorized by the infant's parent or guardian and the hospital declined to provide such treatment on the basis of the child's disability, the hospital's action would violate Section 504.

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[73] J.W. Ellis and R. Luckasson, "Denying Treatments to Infants with Handicaps: A Comment on *Bowen v. American Hospital Association*," 24 *Mental Retardation* 237, 239 (1986).

[74] U.S. Commission on Civil Rights, *supra* note 3, at 78.

B. The Child Abuse Amendments of 1984

1. Overview

In recognition of the need for new legislation dealing with the denial of lifesaving treatment to disabled infants, Congress enacted the Child Abuse Amendments in 1984.[76] The 1984 Amendments required states, as of October 1985, to enact procedures or programs within child protective service agencies to respond to cases in which medical treatment is withheld from disabled infants.

Specifically, the Child Abuse Amendments prohibit "withholding of medically indicated treatment" from disabled infants with "life-threatening conditions."[77] The premise of the Amendments is that all disabled infants "must under all circumstances receive appropriate nutrition, hydration and medication," and "must be given medically indicated treatment."[78] "Medically indicated treatment" is generally defined as the treatment most likely to correct or ameliorate the condition (maximum treatment) based upon the reasonable medical judgment of the treating physician.[79] Treatment is not considered to be "medically indicated" (and thus maximum indicated treatment is not required), however, in three circumstances:

> [when] in the treating physician's or physicians' reasonable medical judgment, (A) the infant is chronically and irreversibly comatose; (B) the provision of such treatment would—(i) merely prolong dying; (ii) not be effective in ameliorating or correcting all of the infant's life threatening conditions; or (iii) otherwise be futile in terms of the survival of the infant; or (C) the provision of such treatment would be virtually futile in terms of the survival of the infant and the treatment itself under such circumstances would be inhumane.[80]

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[75] 476 U.S. at 624, 106 S. Ct. at 2111.

[76] 42 U.S.C.A. §§5101-5106, 5111-5113, 5115 (West Supp. 1990).

[77] 42 U.S.C.A. §5106(g)(10) (West Supp. 1990).

[78] Child Abuse and Neglect Prevention and Treatment Program, 49 *Fed. Reg.* 48160 (1984) (to be codified at 45 C.F.R. Part 1340).

[79] U.S. Commission on Civil Rights, *supra* note 3, at 86-87.

[80] 42 U.S.C.A. §5106(g)(10) (West Supp. 1990).

Pursuant to the Amendments, a disabled infant (which includes, but is not limited to, children under one year of age)[81] with a life-threatening condition (defined as a condition that, in the treating physician's "reasonable medical judgment, significantly increases the risk of the onset of complications that may threaten the life of the infant")[82] must *always* be provided with "appropriate nutrition, hydration and medication," even when one of the three circumstances exist in which medically indicated treatment is not required. The withholding of food, water, and palliative medicine is viewed as a form of child abuse, and is therefore never permitted under the Child Abuse Amendments.[83]

The requirement that medical treatment be provided to disabled infants that, in the reasonable medical judgment of the treating doctors, "will be most likely to be effective in ameliorating or correcting" the child's life-threatening conditions, has been stated as requiring a higher standard of care than that required under the Equal Protection Clause.[84] As noted by the U.S. Commission on Civil Rights, "[c]hildren covered by the law must be provided the treatment 'most likely to be effective,' not just the level of treatment that would be provided to their non-disabled counterparts. This places a responsibility on physicians to become knowledgeable about and employ the best available treatment rather than simply to avoid discriminating on the basis of disability."[85] Unquestionably, the Child Abuse Amendments prohibit treatment decisions relating to disabled infants from being based on "quality of life" theories.[86]

2. Exceptions to Providing Medically Indicated Treatment

As previously noted, medical treatment to correct or ameliorate life-threatening conditions need not be provided under the Child Abuse Amendments when:

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[81] *See, e.g.*, 45 C.F.R. §1340.15(b)(3)(i) (1989).

[82] 45 C.F.R. Part 1340 App. Interpretative Guideline 2 (1989).

[83] *See, e.g.*, U.S. Commission on Civil Rights at 85-86. At least one commentator, however, has argued that by including the qualifying word "appropriate," the statute implies that there are undefined conditions in which food, water, or medication are "inappropriate." According to that commentator, because neither the statute nor its regulations define the term "appropriate," it is an open question as to whether cost, family circumstances, and other factors may be considered when determining what conditions are appropriate. S.R. Smith, "Disabled Newborns and the Federal Child Abuse Amendments: Tenuous Protection," 37 *Hastings Law Journal* 765 (May 1986) (hereinafter Smith). Other commentators disagree, however, and view the nourishment and medication requirement as absolute. *E.g.*, U.S. Commission on Civil Rights at 86. The interpretative guidelines to the amendments tend to support the "absolute" theory. *See, e.g.*, 45 C.F.R. Part 1340 App. Interpretative Guideline 10 (1987).

[84] U.S. Commission on Civil Rights, *supra* note 3, at 87.

[85] *Id.*

[86] 45 C.F.R. Part 1340 App. Interpretative Guideline 1 (1989) ("the definition's focus on the potential effectiveness of treatment in ameliorating or correcting life-threatening conditions makes clear that it

a. A child is "chronically and irreversibly comatose;"[87]
b. The provision of such treatment "would merely prolong dying;"
c. The provision of such treatment would "not be effective in ameliorating or correcting all of the infant's life-threatening conditions;"
d. The provision of such treatment would "otherwise be futile in terms of the survival of the infant;" *or*
e. The provision of such treatment would "be virtually futile in terms of the survival of the infant and the treatment itself under such circumstances would be inhumane."[88]

Several questions are at issue when looking to these exceptions.

First, when would treatment "merely prolong dying"? A proposed definition of that term to mean that death was "imminent" was firmly rejected.[89] Rather, the exception is said not to "apply where many years of life will result from the provision of treatment, or where the prognosis is not for death in the near future, but rather the more distant future."[90] The term "more distant future" is not defined, but is left to reasonable medical judgment.[91]

Second, what is meant by the terms "futile" in exception (d) and "virtually futile" in exception (e)? According to the U.S. Commission on Civil Rights, the distinction between the two terms "lies in the degree of probability or uncertainty in determining the futility of the treatment."[92] The DHHS Interpretative Guidelines define the term "virtually futile" as meaning that treatment "is highly unlikely to prevent death in the near future."[93]

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does not sanction decisions based on subjective opinions about the future 'quality of life' of a . . . disabled person").

[87] While a chronically and irreversibly comatose disabled infant need not be provided with medical treatment to correct or ameliorate life-threatening conditions, however, a disabled infant in a "persistent vegetative state" *must* be provided with such treatment. While both conditions involve a permanent, irreversible lack of consciousness, a comatose individual is in a state of unconsciousness resembling sleep, while an individual in a persistent vegetative state experiences a sleep/wake cycle, random eye movement, and some reflexive response to deeply painful stimuli.

For a comprehensive analysis of the difference between the two conditions, *see, e.g.*, U.S. Commission on Civil Rights, *supra* note 3, at 88-89; Newman, *supra* note 17, at 24-26. Professor Newman strongly criticizes this distinction. The professor notes that numerous courts have allowed the denial of treatment to persons in persistent vegetative states. Indeed, the Arizona Supreme Court concluded in *Rasmussen v. Fleming*, 154 Ariz. 207, 218, 741 P.2d 674, 685 (1987), that legally there is no "material significance" between a comatose individual and an individual in a persistent vegetative state.

[88] 42 U.S.C.A. §5106(g)(10) (West Supp. 1990).

[89] *See, e.g.*, 49 *Fed. Reg.* 14879 (1984) (to be codified at 45 C.F.R. Part 1340).

[90] 45 C.F.R. Part 1340 App. Interpretative Guideline 5 (1989).

[91] *Id.*

[92] U.S. Commission on Civil Rights at 90.

[93] 45 C.F.R. Part 1340 App. Interpretative Guideline 8 (1989).

Third, what is meant by the requirement in exception (c) that the treatment be "inhumane"? The Interpretative Guidelines provide that treatment is inhumane in the event of "significant medical contraindications and/or significant pain and suffering for the infant that clearly outweigh the very slight potential benefit of the treatment for an infant unlikely to survive."[94]

Fourth, what is meant by the requirement in the last exception that to withhold medical treatment the provision of such treatment must be *both* inhumane and "virtually futile"? One commentator has strongly criticized this dual requirement, concluding (rightly or wrongly) that:

> Even where treatment would be inhumane, that by itself is insufficient reason to stop treating; exception (C) requires that treatment be inhumane *and* have virtually no chance of saving the life of the infant. A slim chance of survival apparently justifies inhumane treatment as does some chance of survival wracked by excruciating pain, severe abnormalities and a torturous regime of medical interventions.[95]

These, and other, terms under the Amendments are obviously imprecise, and will insert a degree of subjectivity into their analyses. Despite such interpretative problems, however, the Child Abuse Amendments constitute a strong mandate against discriminatory treatment of disabled newborns, and will require reasonable deliberation by interested parties before making determination to withhold treatment. The more crucial questions are whether the particulars of the mandate are sound and whether the mandate will make any practical differences in light of its inherent subjectivity and the difficulty with enforcement.

3. Soundness of the Mandate

It has been argued that the Child Abuse Amendments are premised on socially, politically and theoretically unsound precepts. Professor Newman, for example, opines that "[o]rdering medical interventions that perpetuate extreme conditions of physical and mental devastation, subjecting infants to grave suffering for uncertain benefits, and depriving parents of virtually all decisionmaking power violates the norm of governments constitutionally committed to individual liberty, human dignity and family autonomy."[96] Professor Newman notes that:

> Reading the statute, one may easily forget that parents normally decide upon medical care for children. Their informed consent is required by law. Both law and society regard parents as the primary protectors of their child's best interests. Under this statute, however, loving, conscientious parents, as well as uncaring, neglectful ones, are deprived of decisionmaking rights as the state assumes the traditional parental role of making critical choices for the child

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[94] 45 C.F.R. Part 1340 App. Interpretative Guideline 9 (1989).

[95] Newman, *supra* note 17, at 4.

[96] Newman, *supra* note 17, at 1.

> with the medical guidance of a physician. Indeed, underlying the statute seems to be a view of parents as suspect bystanders, presumptively ready to commit child abuse by depriving their infants of necessary medical care.[97]

To the converse, the U.S. Commission on Civil Rights strongly supports the premise of the Child Abuse Amendments.[98] The Commission would like to see strong enforcement of the Act by the Department of Health and Human Services.[99]

4. Enforcement

At the onset it is important to note that only those states that opt to receive federal child abuse funds are required to comply with the Child Abuse Amendments.[100] According to the U.S. Commission on Civil Rights, "[a]s of December 1988, four states — California, Indiana, Ohio and Pennsylvania—did not receive funds under the Child Abuse Prevention and Treatment Act, and the law did not apply to them."[101] Moreover, the only remedy available under the Child Abuse Amendments is the loss of federal funds (unlike the private remedies available in a Section 504 action).[102] And actions by state child abuse and neglect agencies under the Child Abuse Amendments can only be considered on a case-by-case basis (unlike Section 504 cases, which can be the subject of a class action).[103]

In addition, as one commentator has explained, under the Child Abuse Amendments the following chain of events must occur to ensure that medical treatment is provided to a handicapped infant:

> 1. Someone at the hospital must know or suspect that lifesaving treatment is being withheld improperly from an infant.
> 2. That person must inform (or be) the designated internal reporter of the suspected child neglect or voluntarily inform the child protective services agency of the neglect.
> 3. The designated person (or other knowledgeable person) must inform the agency of the suspected abuse.
> 4. The agency must adequately investigate to determine whether treatment is being withheld improperly.

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[97] Newman, *supra* note 17, at 5.

[98] *See, e.g.*, U.S. Commission on Civil Rights, *supra* note 3, at 79-92.

[99] *Id.* at 141.

[100] *See* 42 U.S.C.A. §5106(b) (West Supp. 1990), and 45 C.F.R. §§1340.15(c)(2)(ii) and 1340.14(d) (1987).

[101] U.S. Commission on Civil Rights, *supra* note 3, at 82.

[102] *See, e.g.*, U.S. Commission on Civil Rights, *supra* note 3, at 77.

[103] *Id.*

5. If treatment is being withheld improperly, the agency must either convince the parents to accept the treatment or seek a court order to provide the treatment.
6. The court must order the treatment, applying criteria similar to those in the federal statute.[104]

All these events ordinarily must occur in a relatively short time period because of the infant's urgent needs."[105] In practical terms, it is unclear how often this chain of events will take place.

Another problem with respect to the enforceability of the Child Abuse Amendments involves the willingness—or unwillingness—of relevant personnel or committees to report instances of suspected medical neglect of disabled infants,[106] and to rule that medical neglect has in fact occurred. The regulations promulgated pursuant to the Child Abuse Amendments provide that states receiving federal funds "must ensure that health-care facilities designate individuals with the duty promptly to notify the state child protective services agency of all 'cases of suspected medical neglect (including instances of the withholding of medically indicated treatment from disabled infants with life-threatening conditions)'."[107] According to the Civil Rights Commission, there are "widespread failures to report" in accord with this provision.[108] Moreover, although the regulations provide that an independent medical evaluation must be conducted in each instance of suspected medical neglect, and allow persons performing such evaluations access to necessary medical records for purposes of conducting an adequate investigation,[109] it has been stated that "in 90 to 95 percent of the cases, the hospital under investigation for medical neglect is permitted to name the 'independent' medical authority who will rule on whether the course of treatment or nontreatment is proper."[110]

Finally, the lack of precision in setting parameters with respect to the exceptions discussed earlier will impact on enforcement. When there is a difference of opinion among medical authorities, the burden of proving neglect will presumably be on the state agency.

For all of these reasons, the effectiveness of the Child Abuse Amendments in preventing the allegedly discriminatory medical treatment of disabled infants is questionable.

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[104] Smith, *supra* note 83, at 819.

[105] *Id.*

[106] *See, e.g.*, U.S. Commission on Civil Rights, *supra* note 3, at 112-113.

[107] 45 C.F.R. §1340.15(c)(2)(ii) (1987), cited at U.S. Commission on Civil Rights at 127.

[108] U.S. Commission on Civil Rights, *supra* note 3, at 127.

[109] *See, e.g.*, 45 C.F.R. §1340.15(c)(4) (1989).

[110] U.S. Commission on Civil Rights at 113.

C. Infant Care Review Committees

Both the final DHHS regulations under Section 504[111] and the Child Abuse Amendments of 1984[112] recommend that hospitals establish internal infant care review committees (ICRCs) to review situations in which life-preserving medical treatment is or may be withheld from infants with disabilities. According to the U.S. Commission on Civil Rights, a "1986 survey found that 51.8 percent of hospitals with either a neonatal intensive care unit or over 1,500 births annually had established such committees, and an additional 8.9 percent were in the process of forming them."[113] The question is, assuming that policy reasons justify the mandatory treatment of disabled infants, does an ICRC serve as an adequate safeguard to protect infants with disabilities from the denial of lifesaving medical treatment?

The DHHS regulations state the purpose of ICRCs as being "to assist the health care provider in the development of standards, policies and procedures for providing treatment to handicapped infants and in making decisions concerning medically beneficial treatment in specific cases."[114] The Department of HHS recommends that the ICRC consist of at least seven members, including: (a) a practicing physician; (b) a practicing nurse; (c) a hospital administrator; (d) a representative of the legal profession; (e) a representative of a disability group (or a developmental disability expert if developmental disability is at issue); (f) a lay community member; and (g) a member of the hospital's medical staff—who shall chair the committee.[115] These members may be—but are not required to be—supplemented by other members, such as clergy, legal and medical experts, parents of a disabled child or social workers.

ICRCs have no authority to make treatment decisions. Rather, the ICRCs serve merely in an advisory capacity. Thus, while ICRCs are likely to be contacted when there is a disagreement between the infant's family and the medical authorities, it is less likely that they will be called upon to render advice when parents and a physician mutually decide to withhold treatment from a disabled infant. Moreover, even in situations where an ICRC is called upon to render advice, several factors may detract from the effectiveness of that committee. Two critical points that may bear upon the effectiveness of ICRCs are the fact that non-medical committee members may be unable to understand the complex issues involved, and the fact that it will be difficult for such a large body of persons to make decisions as quickly as necessary in this type of life-or-death situation.[116] Additionally, as stated by the U.S. Commission on Civil Rights:

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[111] 45 C.F.R. §§84.55(a) and (b) (1989). The Supreme Court's decision in *Bowen v. American Hospital Association* did not invalidate this portion of the DHHS rules. *See* 476 U.S. at613-14 n.4, 106 S. Ct. at 2105 n.4.

[112] 42 U.S.C.A. §5103 note (West Supp. 1990).

[113] U.S. Commission on Civil Rights, *supra* note 3, at 118. The survey referred to was conducted by the University of Connecticut Pediatric Research and Training Center and the American Academy of Pediatrics; it was funded by the National Institute for Disability and Rehabilitation Research of the U. S. Department of Education.

[114] 45 C.F.R. §84.55(a) (1989).

[115] 45 C.F.R. §84.55(f)(iii) (1989).

> It is questionable whether most committees are constructed in a manner that suits them to searching scrutiny of proposed denials of treatment. Infant care review committees, although they upon occasion have "outside" members, represent an approach to the "Baby Doe" problem that relies essentially upon the internal self-regulation of the health care community. Not only the Department of Health and Human Services, but also the American Academy of Pediatrics, recommended that committees include representatives of disability groups. But, . . . in practice, a disability perspective is often unrepresented on the committees. The 1986 survey found that of the responding hospitals, less than a quarter of their ethics committees—23.9 percent—had a representative of a disability group. Instead, the committees are dominated by health care personnel from the institutions themselves. A practicing pediatrician serves on 86.6 percent of the committees, a practicing neonatologist on 75 percent, a practicing physician of another specialty on 80.2 percent, a practicing registered nurse on 88.4 percent, and a hospital administrator on 78.3 percent.
>
> Yet, a preponderance of medical personnel on committees does not necessarily mean that they are especially well equipped to serve as prognosis committees. As [one witness] . . . testified, "[M]ost committees are not committees of experts in the medical field that the patient's problem lies."[117]

The Commission on Civil Rights, therefore, has concluded that ICRCs "cannot be relied upon alone to ensure that children with disabilities are accorded the lifesaving treatment that is their right by law."[118]

Of course, as previously noted in this chapter, whether mandatory treatment of seriously ill disabled newborns is—or should be—required by law is unclear. Reasonable minds can, and do, differ with respect to those issues. If the divergence of opinion concerning treatment continues for the foreseeable future (which appears will be the case), it may be possible for the different factions to reach a consensus regarding the process to be used in reaching treatment decisions. Presumably few persons support anything less than a reasoned decision by the interested parties.

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[116] *See generally*, Smith, *supra* note 83, at 717-18.

[117] U.S. Commission on Civil Rights, *supra* note 3, at 128 (footnotes omitted).

[118] U.S. Commission on Civil Rights, *supra* note 3, at 129. The Commission also noted that "At the same time, it is clear that [ICRCs] are here to stay. Therefore, the Commission believes there is a need to ensure that there be independent, contemporaneous scrutiny of infant care review committee proceedings, preferably by medically knowledgeable and experienced disability advocates, and that the prompt reporting requirement be more vigorously enforced to make this possible." *Id.* (footnote omitted).

Appendix
A

REHABILITATION ACT OF 1973
SEC. 504 (29 U.S.C. 794)

Sec. 794. Nondiscrimination under Federal grants and programs; promulgation of rules and regulations

(a) No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) For the purposes of this section, the term 'program or activity' means all of the operations of —

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 1471(12) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship —

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance.

(c) Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on the date of the enactment of this subsection.

(Pub. L. 93-112, title V, Sec. 504a, Sept. 26, 1973, 87 Stat. 394; Pub. L. 95-602, title I, Secs. 119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987; Pub. L. 99-506, title I, Sec. 103(d)(2)(B), title X, Sec. 1002(e)(4), Oct. 21, 1986, 100 Stat. 1810, 1844; Pub. L. 100-259, Sec. 1, Mar. 22, 1988, 100 Stat. 28; Pub. L. 100-630, title II, Sec. 206(d), Nov. 7, 1988, 102 Stat. 3312.)

Appendix

B

LIST OF REGULATIONS PROMULGATED UNDER SEC. 504 OF THE REHABILITATION ACT OF 1973

ACTION, 45 C.F.R. §§ 1232.1-.16 (1989).

Administrative Conference of the United States, 1 C.F.R. §§ 326.101-.171 (1989).

Advisory Commission on Intergovernmental Relations, 5 C.F.R. §§ 1720.101-.170 (1989).

Advisory Committee on Federal Pay, 5 C.F.R. §§ 1411.101-.170 (1989).

Advisory Council on Historic Preservation, 36 C.F.R. §§ 812.101-.170 (1989).

Agency for International Development IDCA, 22 C.F.R. §§ 217.1-.61, 219.101-.170 (1989).

American Battle Monuments Commission, 36 C.F.R. §§ 406.101-.170 (1989).

Architectural and Transportation Barriers Compliance Board, 36 C.F.R. §§ 1154.101-.170 (1989).

Board for International Broadcasting, 22 C.F.R. §§ 1304.101-.170 (1989).

Commerce, Department of, 15 C.F.R. §§ 8b.1-26 (1989).

Commission for Purchase from Blind, Severely Handicapped, 41 C.F.R. §§ 51-9.10-.170 (1989).

Commission of Fine Arts, 45 C.F.R. §§ 2104.101-.170 (1989).

Commodity Futures Trading Commission, 17 C.F.R. §§ 149.101-.170 (1989).

Consumer Product Safety Commission, 16 C.F.R. §§ 1034.101-.170 (1989).

Defense, Department of, 32 C.F.R. §§ 56.1-.10 (1989).

Education, Department of, 34 C.F.R. §§ 101.4-104.51 (1989).

Energy, Department of, 10 C.F.R. §§ 1041.101-.170 (1989).

Environmental Protection Agency, 40 C.F.R. §§ 7.45-.75 (1989).

Export-Import Bank of United States, 12 C.F.R. §§ 410.101-.170 (1989).

Federal Communications Commission, 47 C.F.R. §§ 1.1801-.1870 (1988).

Federal Election Commission, 11 C.F.R. §§ 6.101-.170 (1989).

Federal Maritime Commission, 46 C.F.R. §§ 507.101-.170 (1988).

Federal Mine Safety and Health Review Commission, 29 C.F.R. §§ 2706.101-.170 (1989).

Federal Trade Commission, 16 C.F.R. §§ 6.101-.170 (1989).

Health and Human Services, Department of, 45 C.F.R. §§ 84.1-84.61 (1989).

Inter-American Foundation, 22 C.F.R. §§ 1005.101-.170 (1989).

Interior, Department of, 43 C.F.R. §§ 17.200-.570 (1988).

International Boundary and Water Commission, 22 C.F.R. §§ 1103.101-.170 (1989).

Interstate Commerce Commission, 49 C.F.R. §§ 1014.101-.170 (1989).

Japan-United States Friendship Commission, 22 C.F.R. 1600.101-.170 (1989).

Justice, Department of, 28 C.F.R. §§ 39.101-.170, 41.1-.58, 42.501-.540 (1989).

Labor, Department of, 29 C.F.R. §§ 32.1-.51, 33.1-.13 (1989).

Marine Mammal Commission, 50 C.F.R. §§ 550.101-.170 (1989).

National Aeronautics and Space Administration, 14 C.F.R. §§ 1251.100-.570 (1989).

National Capital Planning Commission, 1 C.F.R. §§ 457.101-.171 (1989).

National Commission for Employment Policy, 1 C.F.R. §§ 500.101-.171 (1989).

National Commission on Libraries and Information Science, 45 C.F.R. §§ 1706.101-.170 (1989).

National Credit Union Administration, 12 C.F.R. §§ 794.101-.170 (1989).

National Foundation on the Arts and Humanities, 45 C.F.R. §§ 1151.1-.44, 1153.101-.170, 1170.1-.55, 1175.101-.170, 1181.101-.170 (1989).

National Science Foundation, 45 C.F.R. §§ 605.0-.61 (1989).

National Transportation Safety Board, 49 C.F.R. §§ 807.101-.170 (1988).

Navajo and Hopi Indian Relocation Commission, 25 C.F.R. §§ 720.101-.170 (1989).

Nuclear Regulatory Commission, 10 C.F.R. §§ 4.101-.233 (1989).

Occupational Safety and Health Review Commission, 29 C.F.R. §§ 2205.101-.170 (1989).

Office of Elementary and Secondary Education, 34 C.F.R. §§ 222.70-.79 (1988).

Office of Federal Inspection, 10 C.F.R. §§ 1535.101-.170 (1989).

Office of Personnel Management, 5 C.F.R. §§ 900.701-.710 (1989).

Office of Special Education and Rehabilitation Services Education, 34 C.F.R. §§ 300.1-.754 (1988).

Pennsylvania Avenue Development Corporation, 36 C.F.R. §§ 906.1-.10, 909.101-.170 (1989).

Pension Benefit Guaranty Corporation, 29 C.F.R. §§ 2608.101-.170 (1989).

Selective Service System, 32 C.F.R. §§ 1699.101-.170 (1988).

Small Business Administration, 13 C.F.R. §§ 113.1-.8 (1989).

State, Department of, 22 C.F.R. §§ 142.1-.70, 144.101-.170 (1988).

Tennessee Valley Authority, 18 C.F.R. §§ 1307.1-.13-1313.101-.170 (1989).

Transportation, Department of, 14 C.F.R. §§ 382.1-.25 (1989); 49 C.F.R. §§ 27.1-.129 (1989).

United States Arms Control and Disarmament Agency, 22 C.F.R. §§ 607.101-.170 (1989).

United States Commission on Civil Rights, 45 C.F.R. §§ 707.1.-707.12 (1990).

United States Information Agency, 22 C.F.R. §§ 530.101-.170 (1989).

United States International Trade Commission, 19 C.F.R. §§ 201.101-.170 (1989).

United States Postal Service, 39 C.F.R. §§ 255.1-.4 (1989).

Urban Mass Transportation Administration, 49 C.F.R. §§ 609.1-.25 (1988).

Veterans' Administration, 38 C.F.R. §§ 18.401-.461, 21.1-7310 (1988).

Appendix

C

REHABILITATION ACT OF 1973
SEC. 505 (29 U.S.C. 794a)

Sec. 794a. Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. (Pub. L. 93-112, title V, Sec. 505, as added Pub. L. 95-602, title I, Sec. 120, Nov. 6, 1978, 92 Stat. 2982.)

Appendix

D

REHABILITATION ACT OF 1973
SEC. 501 (29 U.S.C. 791)

Sec. 791. Employment of individuals with handicaps

(a) Interagency Committee on Handicapped Employees; establishment; membership; co-chairmen; availability of other Committee resources; purpose and functions

There is established within the Federal Government an Interagency Committee on Handicapped Employees (hereinafter in this section referred to as the "Committee"), comprised of such members as the President may select, including the following (or their designees whose positions are Executive Level IV or higher): the Chairman of the Equal Employment Opportunity Commission (hereafter in this section referred to as the "Commission"), the Administrator of Veterans' Affairs, and the Secretary of Labor, the Secretary of Education, and the Secretary of Health and Human Services. The Secretary of Education and the Chairman of the Commission shall serve as co-chairpersons of the Committee. The resources of the President's Committees on Employment of People With Disabilities and on Mental Retardation shall be made fully available to the Committee. It shall be the purpose and function of the Committee (1) to provide a focus for Federal and other employment of individuals with handicaps, and to review, on a periodic basis, in cooperation with the Commission, the adequacy of hiring, placement, and advancement practices with respect to individuals with handicaps, by each department, agency, and instrumentality in the executive branch of Government, and to insure[1] that the special needs of such individuals are being met; and (2) to consult with the Commission to assist the Commission to carry out its responsibilities under subsections (b), (c), and (d) of this section. On the basis of such review and consultation, the Committee shall periodically make to the Commission such recommendations for legislative and administrative changes as it deems necessary or desirable. The Commission shall timely transmit to the appropriate committees of Congress any such recommendations.[1]So in original. Probably should be "ensure".

(b) Federal agencies; affirmative action program plans

Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after September 26, 1973, submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with handicaps in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of employees with handicaps are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with handicaps.

(c) State agencies; rehabilitated individuals, employment

The Commission, after consultation with the Committee, shall develop and recommend to the Secretary for referral to the appropriate State agencies, policies and procedures which will facilitate the hiring, placement, and advancement in employment of individuals who have received rehabilitation services under State vocational rehabilitation programs, veterans' programs, or any other program for individuals with handicaps, including the promotion of job opportunities for such individuals. The Secretary shall encourage such State agencies to adopt and implement such policies and procedures.

(d) Report to Congressional committees

The Commission, after consultation with the Committee, shall, on June 30, 1974, and at the end of each subsequent fiscal year, make a complete report to the appropriate committees of the Congress with respect to the practices of and achievements in hiring, placement, and advancement of individuals with handicaps by each department, agency, and instrumentality and the effectiveness of the affirmative action programs required by subsection (b) of this section, together with recommendations as to legislation which have been submitted to the Commission under subsection (a) of this section, or other appropriate action to insure the adequacy of such practices. Such report shall also include an evaluation by the Committee of the effectiveness of the activities of the Commission under subsections (b) and (c) of this section.

(e) Federal work experience without pay; non-Federal status

An individual who, as a part of an individualized written rehabilitation program under a State plan approved under this chapter, participates in a program of unpaid work experience in a Federal agency, shall not, by reason thereof, be considered to be a Federal employee or to be subject to the provisions of law relating to Federal employment, including those relating to hours of work, rates of compensation, leave, unemployment compensation, and Federal employee benefits.

(f) Federal agency cooperation; special consideration for positions on President's Committee on Employment of People With Disabilities

(1) The Secretary of Labor and the Secretary of Education are authorized and directed to cooperate with the President's Committee on Employment of People With Disabilities in carrying out its functions.

(2) In selecting personnel to fill all positions on the President's Committee on Employment of People With Disabilities, special consideration shall be given to qualified individuals with handicaps.

(Pub. L. 93-112, title V, Sec. 501, Sept. 26, 1973, 87 Stat. 390; Pub. L. 96-88, title III, Sec. 301(a)(4)(A), title V, Sec. 507, Oct. 17, 1979, 93 Stat. 678, 692; Pub. L. 98-221, title I, Sec. 104(b)(3), Feb. 22, 1984, 98 Stat. 18; Pub. L. 99-506, title I, Sec. 103(d)(2)(C), title X, Secs. 1001(f)(1), 1002(e)(1), (2)(A), Oct. 21, 1986, 100 Stat. 1810, 1843, 1844; Pub. L. 100-630, title II, Sec. 206(a), Nov. 7, 1988, 102 Stat. 3310.)

Appendix
E

REHABILITATION ACT OF 1973
SEC. 503 (29 U.S.C. 793)

Sec. 793. Employment under Federal contracts

(a) Amount of contracts or subcontracts; provision for employment and advancement of qualified individuals with handicaps; regulations

Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract, the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with handicaps as defined in section 706(8) of this title. The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after September 26, 1973.

(b) Administrative enforcement; complaints; investigations; departmental action

If any individual with handicaps believes any contractor has failed or refused to comply with the provisions of a contract with the United States, relating to employment of individuals with handicaps, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

(c) Waiver by President; national interest special circumstances for waiver of particular agreements

The requirements of this section may be waived, in whole or in part, by the President with respect to a particular contract or subcontract, in accordance with guidelines set forth in regulations which the President shall prescribe, when the President determines that special circumstances in the national interest so require and states in writing the reasons for such determination.
(Pub. L. 93-112, title V, Sec. 503, Sept. 26, 1973, 87 Stat. 393; Pub. L. 95-602, title I, Sec. 122(d)(1), Nov. 6, 1978, 92 Stat. 2987; Pub. L. 99-506, title I, Sec. 103(d)(2)(B), (C), title X, Secs. 1001(f)(2), (3), 1002(e)(3), Oct. 21, 1986, 100 Stat. 1810, 1843, 1844; Pub. L. 100-630, title II, Sec. 206(c), Nov. 7, 1988, 102 Stat. 3312.)

Appendix F

PART 1190
MINIMUM GUIDELINES AND REQUIREMENTS FOR ACCESSIBLE DESIGN

Subpart A—General

Sec.

1190.1 Purpose.
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1190.3 Definitions.
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Subpart B—Scope

1190.30 Scope. [Reserved]
1190.31 Accessible buildings and facilities: New construction.
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Subpart C—Technical Provisions

1190.40 Technical specifications.
1190.50 Exceptions.

Subpart D—Special Building or Facility Types or Elements

1190.60 Special building or facility types.

Authority: Sec. 502(b), Rehabilitation Act of 1973 (29 U.S.C. 792(b)(7)), as amended by the Rehabilitation, Comprehensive Services, and Developmental

Disabilities Amendments of 1978 (Sec. 119, Pub. L. 602, 92 Stat. 2982, and the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1801). Source: 47 FR 33864, Aug. 4, 1982, unless otherwise noted.

Subpart A—General

Sec. 1190.1 Purpose.

The purpose of this part is to implement section 502(b)(7) of the Rehabilitation Act of 1973 (29 U.S.C. 792(b)(7)), as amended, which requires the Architectural and Transportation Barriers Compliance Board to establish minimum guidelines and requirements for standards issued under the Architectural Barriers Act of 1968 (42 U.S.C. 4151 et seq.), as amended. This part and the standards to be based on it are intended to ensure that certain buildings and facilities financed with Federal funds are designed, constructed, or altered so as to be readily accessible to, and usable by, physically handicapped persons.

Sec. 1190.2 Applicability: Building and facilities subject to guidelines and standards

(a) Definitions. As used in this section, the term:

(1) "Constructed or altered on behalf of the United States" means constructed or altered for purchase by the United States, or constructed or altered for the use of the United States.

(2) "Primarily for use by able-bodied military personnel" means expected to be occupied, used, or visited principally by military service personnel. Examples of buildings so intended are barracks, officers' quarters, and closed messes.

(3) "Privately owned residential structures" means a single or multifamily dwelling not owned by a unit or subunit of Federal, state, or local government.

(b) Buildings and facilities covered. Except as provided in paragraph (c) of this section, the standards to be issued by the standard-setting agencies in conformance with these minimum guidelines and requirements apply as provided in paragraph (d) of this section to any building or facility—

(1) The intended use for which either—

(i) Will require that such building or facility be accessible to the public, or

(ii) May result in employment or residence therein of physically handicapped persons; and

(2) Which is—

(i) To be constructed or altered by or on behalf of the United States;

(ii) To be leased in whole or in part by the United States after August 12, 1968, and before January 1, 1977, after construction or alteration in accordance with plans and specifications of the United States;

(iii) To be leased in whole or in part by the United States on or after January 1, 1977;

(iv) To be financed in whole or in part by a grant or loan made by the United States after August 12, 1968, if the building or facility may be subject to standards for design, construction, or alteration issued under the law authorizing the grant or loan; or

(v) To be constructed under the authority of the National Capital Transportation Act of 1960, the National Capital Transportation Act of 1965, or Title III of the Washington Metropolitan Area Transit Regulation Compact.

(c) Buildings and facilities not covered. The guidelines and requirements and the standards do not apply to (c)(1) Any privately owned residential structure, unless it is leased by the Federal government on or after January 1, 1977, for subsidized housing programs; or (2) Any building or facility on a military installation designed and constructed primarily for use by able- bodied military personnel.

(d) Application and effective date of standards. Any covered building or facility as provided in this section, which is designed, constructed, or altered after the effective date of a standard issued in conformance with this guideline which is applicable to the building or facility, shall be designed, constructed, or altered in accordance with the standard. Any other building or facility covered by the Architectural Barriers Act, if and when required by law, shall comply with such standards issued in conformance with this part as are appropriate.

[47 FR 33864, Aug. 4, 1982, as amended at 54 FR 5444, Feb. 3, 1989]

Sec. 1190.3 Definitions.

As used in this part, the term:

"ATBCB" means the Architectural and Transportation Barriers Compliance Board. "Access aisle" means a pedestrian space between elements such as parking spaces, seating, and desks. "Accessible" means in compliance with the specifications and requirements of any applicable standard issued by a standard-setting agency in conformance with this part. "Accessible" describes a site, building, facility, or portion thereof that complies with these requirements, and that can be approached, entered, and used by physically handicapped persons. Accessible elements and spaces of a building or facility including doors provided adjacent to a turnstile or a revolving door, shall be subject to the same use patterns as other elements and spaces of the building or facility. "Accessible route" means a continuous unobstructed path connecting accessible elements and spaces in a building or facility and complying with the space and reach requirements of any standard issued by a standard-setting agency in conformance with this part. (Interior accessible routes may include but are not limited to corridors, floors, ramps, elevators, lifts, and clear floor space at fixtures. Exterior accessible routes may include but are not limited to parking access aisles, curb ramps, walks, ramps, and lifts.) "Accessible space" means a space that complies with any standard issued by a standard-setting agency in conformance with this part. "Adaptability" means the capability of certain building spaces and elements, such as kitchen counters, sinks and grab bars, to be altered or added to so as to accommodate the needs of persons with or without disabilities, or to accommodate the needs of persons with different types or degrees of disability. "Addition" means an expansion, extension, or increase in the gross floor area of a building or facility. "Agency" means a Federal department, agency or instrumentality, as defined in sections 551(1) and 701(b)(1) of Title 5, United States Code, or an official authorized to represent an agency. "Alteration" means any change in a building or facility or its permanent fixtures or equipment. It includes, but is not limited to, remodeling, renovation, rehabilitation, reconstruction, changes or rearrangement in structural parts, and extraordinary repairs. It does not include normal maintenance, reroofing, interior decoration, or changes to mechanical systems. "Architectural Barriers Act" means the Architectural Barriers Act of 1968, Pub. L. 90-480, as amended, 42 U.S.C. 4151 et seq. "Assembly area" means a room or space accommodating fifty or more individuals for religious, recreational, educational, political, social, or amusement purposes, or for the consumption of food and drink, and including all connected rooms or spaces with a common means of egress and ingress. Such areas as conference and meeting rooms accommodating fewer than fifty individuals are not considered assembly areas. "Automatic door" means a door—

(1) Used for human passage and

(2) Equipped with a power-operated mechanism and controls that open and close the door upon receipt of a momentary actuating signal. "Building" or "facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, parks, sites, or other real property or interest in such property. "Circulation path" means an exterior or interior way of passage from one place to another for pedestrians, including, but not limited to, walks, hallways, courtyards, stairways, and stair landings. "Clear" means unobstructed. "Common use areas" means those interior and exterior rooms, spaces or elements that are made available for the use of a restricted group of people (for example, residents of an apartment building, the occupants of an office building, or the guests of such residents or occupants). "Construction" means any erection of a new building or of an addition to an existing building or facility. "Cross slope" means the slope that is perpendicular to the direction of travel (see "running slope"). "Curb ramp" means a short ramp cutting through a curb or built up to it. "Detectable" means perceptible by one or more of the senses. "Detectable warning" means a standardized surface texture applied to or built into walking surfaces or other elements to warn visually impaired people of hazards in the path of travel. "Dwelling unit" means a single unit of residence that provides a kitchen or food preparation area, in addition to rooms and spaces for living, bathing, sleeping, and the like. A single family home is a dwelling unit, and dwelling units are to be found in such housing types as townhouses and apartment buildings. "Egress" or "means of egress" means a continuous and unobstructed way of exit travel from any point in a building or facility to an exterior walk or out of a fire zone. It includes all intervening rooms, spaces, or elements. "Element" means an

architectural or mechanical component of a building, facility, space, or site, e.g., telephone, curb ramp, door, drinking fountain, seating, water closet. "Entrance" means any access point to a building or portion of a building or facility used for the purpose of entering. An entrance includes the approach walk, the vertical access leading to the entrance platform, the entrance platform itself, vestibules if provided, the entry door(s) or gate(s), and the hardware of the entry door(s) or gate(s). The principal entrance of a building or facility is the main door which most people enter. "Essential features" means those elements and spaces that make a building or facility usable by, or serve the needs of, its occupants or users. Essential features include but are not limited to entrances, toilet rooms, and accessible routes. Essential features do not include those spaces that house the major activities for which the building or facility is intended, such as classrooms and offices. "Exception" means a special provision in this part or in a standard which indicates an acceptable alternative, under specified circumstances, to a requirement stated directly above the exception. "Extraordinary repair" means the replacement or renewal of any element of an existing building or facility for purposes other than normal maintenance. "Full and fair cash value" is calculated for the estimated date on which work will commence on a project and means—

(1) The assessed valuation of a building or facility as recorded in the assessor's office of the municipality and as equalized at one hundred percent (100%) valuation (Note: The one hundred percent (100%) equalized assessed value shall be based upon the state's most recent determination of the particular city's or town's assessment ratio. Example: Town X has an assessment ratio of forty percent (40%), and the particular building in question is assessed at $200,000.00. To determine the equalized assessed value of this building, divide $200,000.00 by .40, and the equalized assessed value equals 500,000.00.);

(2) The replacement cost; or

(3) The fair market value.

"Guidelines and requirements" means this part. "Housing" means a building, facility, or portion thereof, excluding inpatient health care facilities, that contains one or more dwelling units or sleeping accommodations. Housing may include, but is not limited to, one-family and two-family dwellings, multifamily dwellings, group homes, hotels, motels, dormitories, and mobile homes. "Marked crossing" means a crosswalk or other identified path intended for pedestrian use in crossing a vehicular way. "Multifamily housing" means a project containing five or more dwelling units. "Operable part" means a part of equipment or an appliance used to insert or withdraw objects, to activate or deactivate equipment, or to adjust the equipment (e.g., coin slot, push button, handle). "Physically handicapped person" means an individual who has a physical impairment, including impaired sensory, manual, or speaking abilities, which results in a functional limitation in access to and use of a building or facility. "Power-assisted door" means a door—

(1) Used for human passage; and

(2) With a mechanism that helps to open the door, or relieve the opening resistance of a door, upon the activation of a switch or a continued force applied to the door itself.

"Public use" means any interior and exterior rooms or spaces made available to the general public. Public use may be provided at a building or facility that is privately or publicly owned. "Ramp" means a walking surface that has a running slope greater than 1:20. "Reconstruction" means the act or process of reproducing by new construction the exact form and detail of a vanished building, structure, or object, or a part thereof, as it appeared at a specific period of time. "Restoration" means the act or process of accurately recovering the form and details of a property and its setting as it appeared at a particular period of time by means of the removal of later works or by replacement of missing earlier work. "Running slope" means the slope that is parallel to the direction of travel (see "cross slope"). "Section 502 of the Rehabilitation Act" or "Section 502" means section 502 of the Rehabilitation Act of 1973, Pub. L. 93-112, 29 U.S.C. 792, as amended. "Service entrance" means an entrance intended primarily for delivery or service. "Shall" denotes a mandatory requirement. "Signage" means the display of written, symbolic, tactile, or pictorial information. "Site" means a parcel of land bounded by a property line or a designated portion of a public right-of-way. "Site improvements" means landscaping, paving for pedestrian and vehicular ways, outdoor lighting, recreational facilities, and similar site additions. "Sleeping accommodations" means rooms in which people sleep (for example, dormitory and hotel or motel guest rooms). "Space" means a definable area, e.g., toilet room, hall, assembly area, parking area, entrance, storage room, alcove, courtyard, or lobby. "Standard" means any standard for accessibility issued under the Architectural Barriers Act. "Standard-setting agency" means one of the four agencies required to issue standards under the Architectural Barriers Act, i.e., the General Services Administration, the Department of Housing and Urban Development, the Department of Defense, and the United States Postal Service. "Structural impracticability" means having little likelihood of being accomplished without removing or altering a load-bearing structural member and/or incurring an increased cost of 50 percent or more of the value of the element of the building or facility involved. "Tactile" means perceptible through the sense of touch. "Temporary" means elements are not permanent (i.e., installed for less than six months) and are not required for safety reasons. "Walk" means an exterior pathway or space with a prepared surface intended for pedestrian use and having a slope of 1:20 or less. It includes general pedestrian areas such as plazas and courts.

[47 FR 33864, Aug. 4, 1982, as amended at 54 FR 5444, Feb. 3, 1989]

Sec. 1190.4 Issuance of Architectural Barriers Act standards by standard-setting agencies.

(a) These guidelines and requirements are the minimum guidelines and requirements for standards issued under the Architectural Barriers Act by the Administrator of General Services, Secretary of Housing and Urban Development, Secretary of Defense, and Post Master General.

(b) Standards which conform to or exceed the provisions of the guidelines shall be deemed in compliance with the guidelines and requirements.

(c) Each standard-setting agency is encouraged to issue standards which follow the format of these guidelines and requirements. However, standards which differ in format from these guidelines and requirements but are otherwise consistent with the guidelines and requirements shall be deemed in compliance with these guidelines and requirements.

Sec. 1190.5 Guidelines: Other uses.

These minimum guidelines and requirements and those standards published by the four standard-setting agencies under the Architectural Barriers Act of 1968, as amended, may be used by other governmental and non-governmental entities, along with other sources, to develop their own standards.

Sec. 1190.6 Interpretation of guidelines.

(a) These guidelines and requirements shall be liberally construed to carry out the purposes and provisions of the Architectural Barriers Act and Section 502 of the Rehabilitation Act.

(b) Words importing the singular number may extend and be applied to the plural and vice versa. However, unless otherwise specified in the guidelines and requirements, each element or space of a particular building or facility shall comply with the guidelines and requirements.

(c) Use of the imperative mood, e.g., "provide," means the provision is mandatory. This form is being used to avoid wordiness and monotony but means the same as if the word "shall" had been included.

(d) The provisions in the minimum guidelines and requirements are based upon adult dimensions and anthropometrics.

(e) Dimensions that are not marked "minimum" or "maximum" are absolute, unless otherwise indicated in the text or captions. All dimensions are subject to conventional building tolerances for field conditions.

Sec. 1190.7 Severability.

If any section, subsection, paragraph, sentence, clause, or phrase of these guidelines and requirements is declared invalid for any reason, the remaining portions of these guidelines and requirements that are severable from the invalid part shall remain in full force and effect. If a part of these guidelines and requirements is invalid in one or more of its applications, the part shall remain in effect in all valid applications that are severable from the invalid applications.

[47 FR 33864, Aug. 4, 1982. Redesignated 54 FR 5444, Feb. 3, 1989]

Subpart B—Scope

Sec. 1190.30 Scope. [Reserved]

Sec. 1190.31 Accessible buildings and facilities: New construction.

Except as otherwise provided in this part, all new construction of buildings and facilities shall comply with the minimum requirements set forth below. The citations beginning with "ANSI" in the provisions which follow refer to the sections of the American National Standard, ANSI A117.1-1986, "Providing Accessibility and Usability for Physically Handicapped People" by the American National Standards Institute, Inc. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. Copies may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, N.Y. 10018. Copies may be inspected at the office of the U.S. Architectural and Transportation Barriers Compliance Board, 1111 18th Street, NW., Suite 501, Washington, DC or at the Office of the Federal Register, 1100 L Street, NW., Room 8301, Washington, DC.

(a) Accessible route. At least one accessible route shall comply with ANSI A117.1-1986, section 4.3, Accessible Routes (Incorporated by reference, see Sec. 1190.31(a).)

(1) Required accessible route(s) shall connect an accessible building entrance with:

(i) Transportation facilities located within the property line of a given site, including passenger loading zones, public transportation facilities, taxi stands, and parking;

(ii) Public streets and sidewalks;

(iii) Other accessible buildings, facilities, elements, and spaces that are on the same site; and

(iv) All accessible spaces, rooms, and elements within the building or facility.

(2) Where fire code provisions require more than one means of egress from any space or room, then more than one accessible means of egress complying with ANSI A117.1-1986, section 4.3.10 shall be provided for handicapped people and shall be arranged so as to be readily accessible from all accessible rooms and spaces (Incorporated by reference, see Sec. 1190.31(a).)

(b) Parking and passenger loading zones.

(1) If any parking is provided, for employees or visitors, or both, each such parking area shall comply with ANSI A117.1-1986 section 4.6 Parking Spaces and Passenger Loading Zones (Incorporated by reference, see Sec. 1190.31(a)), and the following table:

Total parking in lot	Required minimum number of accessible spaces
1 to 25	1.
26 to 50	2.
51 to 75	3.
76 to 100	4.
101 to 150	5.
151 to 200	6.
201 to 300	7.
301 to 400	8.
401 to 500	9.
501 to 1,000	2 pct of total.
Over 1,000	20 plus 1 for each 100 over 1,000.

Passenger loading zones shall provide an access aisle at least 60 in (1525 mm) wide and 20 ft (60 mm) long adjacent and parallel to the vehicle pull-up space. If there are curbs between the access aisle and the vehicle pull-up space, then a curb ramp complying with ANSI A117.1-1986, section 4.7 shall be provided. A minimum vertical clearance of 114 in (3.45 m) shall be provided at accessible passenger loading zones and along vehicle access routes to such areas from site entrances.

(i) Exception: The total number of accessible parking spaces may be distributed among parking lots, if greater accessibility is achieved.

(ii) Exception: This paragraph does not apply to parking provided for official government vehicles owned or leased by the government and used exclusively for government purposes.

Parking spaces for side lift vans are accessible parking spaces and may be used to meet the requirements of this paragraph.

(2) If passenger loading zones are provided, at least one passenger loading zone shall comply with ANSI A117.1-1986 section 4.6 Parking Spaces and Passenger Loading Zones (Incorporated by reference, see Sec. 1190.31(a)).

(c) Ramps and curb ramps. If there is an abrupt level or grade change, if the slope is greater than 1:20, and if no other means of accessible vertical access is provided, a ramp or curb ramp shall be provided. If a ramp or curb ramp is provided, it shall comply with ANSI A117.1-1986, section 4.7 Curb Ramps or 4.8 Ramps, as appropriate (Incorporated by reference, see Sec. 1190.31(a).).

(d) Stairs. Except as provided in Sec. 1190.31(f)(1), stairs connecting levels that are not connected by an elevator shall comply with ANSI A117.1-1986, section 4.9, Stairs. (Incorporated by reference, see Sec. 1190.31(a).)

(e) Handrails. Handrails shall be provided at each ramp and staircase as required in ANSI A117.1-1986, sections 4.8 Ramps and 4.9 Stairs, respectively. (Incorporated by reference, see Sec. 1190.31(a).)

(f) Elevators. One passenger elevator complying with ANSI A117.1-1986, section 4.10, Elevators (incorporated by reference, see Sec. 1190.31(a)) shall serve each level in all multi-story buildings and facilities. If more than one elevator is provided, each elevator shall comply with ANSI A117.1-1986, section 4.10, Elevators (incorporated by reference, see Sec. 1190.31(a)). All elevator control buttons shall be at least 3/4 in (19mm) in their smallest dimension. They shall be raised or flush.

(1) Exception. Elevator pits, elevator penthouses, mechanical rooms, piping, or equipment catwalks are excepted from this requirement.

(2) Exception. Ramps or platform lifts complying with ANSI A117.1-1986, section 4.8 Ramps and ANSI A117.1-1986, section 4.11 Platform Lifts (incorporated by reference, see Sec. 1190.31(a)), respectively, may be used in lieu of an elevator.

(g) Platform lifts. If the slope is greater than 1:20, and if no other means of accessible vertical access is provided, a platform lift may be provided if there is an abrupt level or grade change. If a platform lift is provided, it shall comply with ANSI A117.1-1986, section 4.11 Platform Lifts (incorporation by reference, see Sec. 1190.31(a)), and should facilitate unassisted entry and exit from the lift.

(h) Entrances. At least one principal entrance at each grade floor level to a building or facility shall comply with ANSI A117.1-1986, section 4.14, Entrances (incorporated by reference, see Sec. 1190.31(a)). When a building or facility has entrances which normally serve any of the following functions: transportation facilities, passenger loading zones, accessible parking facilities, taxi stands, public streets and sidewalks, accessible interior vertical access, then at least one of the entrances serving each such function shall comply with ANSI A117.1-1986, section 4.14, Entrances (incorporated by reference, see Sec. 1190.31(a)). Because entrances also serve as exits, particularly in cases of emergency, the proximity of such accessible entrances and exits to all parts of the building is essential. It is preferable that all or most entrances and exits be accessible. One entrance may serve more than one function.

(i) Doors.

(1) At each accessible entrance to a building or facility, at least one door shall comply with ANSI A117.1-1986, section 4.13, Doors (incorporated by reference, see Sec. 1190.31(a)).

(2) Within a building or facility, at least one door at each accessible entrance to the accessible space shall comply with ANSI A117.1-1986, section 4.13, Doors (incorporated by reference, see Sec. 1190.31(a)).

(3) Each door required by ANSI A117.1-1986, section 4.3.10, Egress (incorporated by reference, see Sec. 1190.31(a)), shall comply with ANSI A117.1-1986, section 4.13, Doors (incorporated by reference, see Sec. 1190.31(a)).

(4) Each door that is an element of an accessible route shall comply with ANSI A117.1-1986, section 4.13, Doors (incorporated by reference, see Sec. 1190.31(a)).

(j) Windows. If operable windows are provided, they shall comply with ANSI A117.1-1986, section 4.12 Windows. (Incorporated by reference, see Sec. 1190.31(a).)"

(k) Toilet and bathing facilities. If toilet and bathing facilities are provided, then each public and common use toilet room shall comply with ANSI A117.1-1986, section 4.22, Toilet Rooms, Bathrooms, Bathing Facilities and Shower Rooms (incorporated by reference, see paragraph (a) of this section. Other toilet rooms shall be adaptable. If bathing facilities are provided, then each public and common use bathing facility shall comply with ANSI A117.1-1986, section 4.22. In each such facility where any of the fixtures and accessories specified in ANSI A117.1-1986, section 4.16, Water Closets; ANSI A117.1-1986, section 4.17, Toilet Stalls; ANSI A117.1-1986, section 4.18, Urinals; ANSI A117.1-1986, section 4.19, Lavatories, Sinks and Mirrors; ANSI A117.1-1986, section 4.20, Bathtubs; and ANSI A117.1-1986, section 4.21, Shower Stalls, are provided, at least one accessible fixture and accessory of each type provided shall comply with the provisions in the subsection applicable to that fixture or accessory. The size and arrangement of toilet stalls shall comply with ANSI Fig. 30(a). Toilet stalls with a minimum depth of 56 in (1420 mm) (see ANSI Fig. 30(a)) shall have wall-mounted closets. If the depth of toilet stalls is increased at least 3 in (75 mm), then a floor mounted water closet may be used. Arrangements shown for toilet stalls may be reversed to allow either a left-hand or right-hand approach. Installation of a fixed shower head may be permitted in lieu of an adjustable height or hand-held shower head in unmonitored facilities where vandalism is a concern. Curbs in shower stalls that are 36 in by 36 in (915 mm by 915 mm) shall have a maximum height of 1/2 in (13 mm). Bathrooms in dwelling units required to be accessible shall comply with ANSI A117.1-1986, section 4.32.4, Bathrooms. For special use situations, refer to Subpart E, Special Building or Facility Types or Elements.

(l) Drinking fountains and water coolers. If drinking fountains or water coolers are provided, approximately 50% of those provided on each floor shall comply with ANSI A117.1-1986, section 4.15, Drinking Fountains and Water Coolers, (incorporated by reference, see Sec. 1190.31(a)), and shall be dispersed throughout the floor. If only one drinking fountain or water cooler is provided on any floor, it shall comply with ANSI A117.1-1986, section 4.15. It is preferred that if only one drinking fountain or water cooler is provided on any floor, then it should have two levels with the lower level complying with ANSI A117.1-1986, section 4.15.

(m) Controls and operating mechanisms. If controls and operating mechanisms are provided in accessible spaces, along accessible routes or as parts of accessible elements, each shall comply with ANSI A117.1-1986, section 4.25, Controls and Operating Mechanisms. (Incorporated by reference, see Sec. 1190.31(a).)

(n) Alarms. If alarm systems are provided, each shall comply with ANSI A117.1-1986, section 4.26, Alarms (incorporated by reference, see Sec. 1190.31(a)). In facilities with sleeping accommodations, the sleeping accommodations required to be accessible shall have an alarm system complying with ANSI A117.1- 1986, section 4.26.4, Auxiliary Alarms. Emergency warning systems in health care facilities may be modified to suit standard health care alarm design practice.

(o) Detectable warnings. Detectable warnings complying with ANSI A117.1-1986, section 4.27.3, Tactile Warnings on Doors to Hazardous Areas (incorporated by reference, see Sec. 1190.31(a)), shall be provided on the hardware of all doors leading to hazardous areas. Such warnings shall not be used at emergency exit doors. Detectable warnings are not required at locations other than doors to hazardous areas by this part. If detectable warnings are provided, the specifications at ANSI A117.1-1986, section 4.27 may be used as guidance. Note—The ATBCB has funded research in the area of detectable tactile surface treatments. The research findings were inconclusive and, therefore, recommended no mandatory requirements at this time. Further information is being developed through additional research on detectable materials and fact- finding on current applications, particularly on transit platforms. Technical assistance materials including information about additional detectable cues (sound and resiliency) not discussed in ANSI are available from the ATBCB, 1111 18th Street, NW, Suite 501, Washington, DC 20036, (202) 653-7834 (voice or TDD).

(p) Signage. Signage shall comply with ANSI A117.1-1986, section 4.28, Signage (incorporated by reference, see Sec. 1190.31(a)). Permanent signage that identifies rooms and spaces shall also comply with ANSI A117.1-1986, section 4.28.4. Exception: The provisions of ANSI A117.1-1986, section 4.28.4 are not mandatory for temporary information on room and space signage, such as current occupant's name, provided the permanent room or space identification complies with ANSI A117.1-1986, section 4.28.4.

(q) Telephones.

(1) If public telephones are provided, then accessible public telephones shall comply with ANSI A117.1-1986, section 4.29, Telephones (incorporated by reference, see Sec. 1190.31(a)), and the following table:

Number of public telephones provided on each floor	Number of telephones required to be accessible[1]
One or more single unit installations	One per floor.
One bank[2]	One per floor.
Two or more banks[2]	One per bank. Accessible unit may be installed as a single unit in proximity (either visible or with signage) to bank. At least one public telephone per floor shall meet the requirements for a forward reach telephone.[3]

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[1] Additional public telephones may be installed at any height; however, the installation of accessible telephones is strongly recommended. Unless otherwise specified, accessible telephones may be either forward reach or side reach telephones.

[2] A bank consists of two or more adjacent public telephones usually installed as a unit.

[3] Exception for exterior installations only: If dial- tone-first service is not available, then a side reach telephone may be installed instead of the required forward reach telephone (i.e., one telephone in proximity to each bank shall meet the requirements of ANSI A117.1-1986, section 4.29, Telephones (incorporated by reference, see Sec. 1190.31(a))).

(2) At least one of the public telephones complying with ANSI A117.1-1986, section 4.29, Telephones (incorporated by reference, see Sec. 1190.31(a)), shall be equipped with a volume control. The installation of additional volume controls is encouraged and these may be installed on any public telephone provided.

(3) Signage. [Reserved]

(r) Seating, tables, and work surfaces. If fixed seating, tables, and work surfaces are provided, at least 5 percent but always at least one of each element shall comply with ANSI A117.1- 1986, section 4.30, Seating, Tables and Work Surfaces. (Incorporated by reference, see Sec. 1190.31(a).)

(s) Assembly areas, conference, or meeting rooms. (1) If assembly areas are provided, accessible viewing positions shall comply with ANSI A117.1-1986, section 4.31, Auditorium and Assembly Areas (incorporated by reference, see 1190.31(a)), and the following table:

Capacity of assembly area	Number of viewing positions
50 to 75	3.
76 to 100	4.
101 to 150	5.
151 to 200	6.
201 to 300	7.
301 to 400	8.
401 to 500	9.
501 to 1,000	2 pct of total.
Over 1,000	20 plus 1 for each 100 over 1,000.

Accessible viewing positions may be clustered in bleachers, balconies, and other areas that have sight lines requiring slopes greater than 5 percent or to permit equivalent accessible viewing positions to be located on levels having accessible egress.

(2) Assembly areas with audio-amplification systems shall have a listening system complying with ANSI A117.1-1986, section 4.31, to assist a reasonable number of people but no fewer than two, with severe hearing loss. For assembly areas without amplification systems and for spaces used primarily as meeting and conference rooms, a permanently installed or portable listening system shall be provided. This requirement may be satisfied by use of a portable system that requires little or no installation. If portable systems are used for conference and meeting rooms, the system may serve more than one room.

(3) If performing areas are provided, accessible routes shall comply with ANSI A117.1-1986, section 4.3, Accessible Routes, to performing areas, includ-

ing but not limited to stages, arena floors, dressing rooms, locker rooms, and other rooms and spaces required for use of the assembly area. (ANSI 4.33.5)

(i) Exception. In alteration work where it is structurally impracticable to alter all performing areas to be on an accessible route, at least one of each type shall be made accessible. (ANSI 4.33.6* and 4.33.7*)

(ii) [Reserved]

(t) Storage. If storage facilities such as cabinets, shelves, closets and drawers are provided in accessible spaces for occupant use, at least one storage facility of each type provided shall comply with ANSI A117.1-1986, section 4.23, Storage. (Incorporated by reference, see Sec. 1190.31(a).) Additional storage may be provided outside of the dimensions provided in ANSI A117.1-1986, section 4.23, Storage. (Incorporated by reference, see Sec. 1190.31(a).)

(u) Housing. Accessible housing shall:

(1) Comply with the requirements of this section as it applies to public use and common use areas and areas where handicapped persons may be employed, except as follows:

(i) Elevators: Where provided, elevators shall comply with ANSI A117.1-1986, section 4.10 (incorporated by reference, see 1190.31(a)). All elevator control buttons shall be at least 3/4 in (19 mm) in their smallest dimension. They shall be raised or flush. Elevators or other accessible means of vertical movement are not required in residential facilities when:

(A) No accessible dwelling units are located above or below the accessible grade level; and

(B) At least one of each type of common area and amenity provided for use of residents and visitors is available at the accessible grade level.

(ii) Entrances: Entrances complying with ANSI 4.14 shall be provided as necessary to achieve access to and egress from buildings and facilities. EXCEPTION: In projects consisting of one- to-four family dwellings where accessible entrances would be extraordinarily costly due to site conditions or local code restrictions, accessible entrances are required only to those buildings containing accessible dwelling units.

(iii) Common Areas: At least one of each type of common area and amenity in each project shall be accessible and shall be located on an accessible route to any accessible dwelling unit.

(2) Provide dwelling units or sleeping accommodations complying with ANSI 4.32, Dwelling Units, in accordance with the following table:

Facilities	Application
Hotels, motels, boarding houses	5 percent of the total units, or at least one, whichever is greater.
Multifamily housing (including apartment houses) Federally assisted	5 percent of the total, or at least one unit, whichever is greater in multifamily housing projects.
Federally owned	5 percent of the total, or at least one unit, whichever is greater in multifamily housing projects.
Dormitories	5 percent of the total, or at least one unit whichever is greater.
One and two family dwelling Federally assisted, rental	5 percent of the total, or at least one unit, whichever is greater, in multifamily housing projects.
Federally assisted homeownership	To be determined by home buyer.
Federally owned	5 percent of the total, or at least one unit, whichever is greater in multifamily housing projects.

(v) Health care facilities. Accessible health care facilities shall:

(1) Comply with the requirements of this Sec. 1190.31 as it applies to public use and common use areas and areas where handicapped persons may be employed; and

(2) Provide patient rooms and patient toilet rooms complying with Part 6 of UFAS in accordance with the following table:

Facilities	Application
Long term care facilities (including skilled nursing facilities, intermediate care facilities, bed and care, and nursing homes)	At least 50 percent of patient toilets and bedrooms.
Outpatient facilities	All patient toilets and bedrooms.
Hospital:	
General purpose hospital	At least 10 percent of patient toilets and bedrooms.
Special purpose hospital (hospitals that treat conditions that affect mobility)	All patient toilets and bedrooms.

[47 FR 33864, Aug. 4, 1982, as amended at 54 FR 5446, Feb. 3, 1989; 54 FR 34977, Aug. 23, 1989]

Sec. 1190.32 Accessible buildings and facilities: Additions.

Each addition to an existing building or facility shall comply with Sec. 1190.31, New construction, except as follows:

(a) Entrances. If a new addition to a building or facility does not have an entrance, then at least one entrance in the existing building or facility shall comply with ANSI A117.1-1986, section 4.14, Entrances. (The citations beginning with "ANSI" in this section refer to the sections of the American National Standard, ANSI A117.1-1986, "Providing Accessibility and Usability for Physically Handicapped People" by the American National Standards Institute, Inc. which has been approved for incorporation by reference as set forth in Sec. 1190.31(a).

(b) Accessible route. If the only accessible entrance to the addition is located in the existing building or facility, then at least one accessible route shall comply with ANSI A117.1-1986, section 4.3, Accessible Route (incorporated by reference, see Sec. 1190.31(a)), and shall provide access through the existing building or facility to all rooms, elements, and spaces in the new addition.

(c) Toilet and bathing facilities. If there are no toilet rooms and bathing facilities in the addition and these facilities are provided in the existing building, then at least one toilet and bathing facility in the existing building shall comply with ANSI A117.1-1986, section 4.22, Toilet Rooms, Bathrooms, Bathing Facilities and Shower Rooms. (Incorporated by reference, see Sec. 1190.31(a).).

(d) Elements, spaces, and common areas. If elements, spaces, or common areas are located in the existing building and they are not provided in the addition, consideration should be given to making those elements, spaces, and common areas accessible in the existing building.

(e) Exception: Mechanical rooms, storage areas, and other such minor additions which normally are not frequented by the public or employees of the facility are excepted from Sec. 1190.32, (a), (b), (c) and (d).

[47 FR 33864, Aug. 4, 1982, as amended at 54 FR 5446, Feb. 3, 1989]

Sec. 1190.33 Accessible buildings and facilities: Alterations.

(a) General. Alterations to existing buildings or facilities shall comply with the following:

(1) If existing elements, spaces, essential features, or common areas are altered, then each such altered element, space, feature, or area shall comply with the applicable provisions of Sec. 1190.31, Accessible buildings and facilities: New construction, except as noted in paragraph (a)(2) of this section.

(2) Exceptions to the requirements for (a)(1) of this section for existing buildings or facilities are:

(i) Stairs. Full extension of stair handrails shall not be required in alterations where such extensions would be hazardous or impossible due to plan configuration.

(ii) Elevators.

(A) If a safety door edge is provided in existing automatic elevators, then the automatic door reopening devices may be omitted (see ANSI A117.1-1986 section 4.10.6). (The citations beginning with "ANSI" in this section refer to the sections of the American National Standard, ANSI A117.1-1986, "Providing Accessibility and Usability for Physically Handicapped People" by the American National Standards Institute, Inc. which has been approved for incorporation by reference as set forth in Sec. 1190.31(a).

(B) Where existing shaft or structural elements prohibit strict compliance with ANSI A117.1-1986, section 4.10.9 (incorporated by reference, see Sec. 1190.31(a)), then the minimum floor area dimensions may be reduced by the minimum amount necessary, but in no case shall they be less than 48 in by 48 in (1220 mm by 1220 mm).

(iii) Doors.

(A) Where existing elements prohibit strict compliance with the clearance requirements of ANSI 4.13.5, a projection of 5/8 in (16 mm) maximum will be permitted for the latch side door stop. (The citations beginning with "ANSI" in this section refer to the sections of the American National Standard, ANSI A117.1-1986, "Providing Accessibility and Usability for Physically Handicapped People" by the American National Standards Institute, Inc. which has been approved for incorporation by reference as set forth in Sec. 1190.31(a).)

(B) If existing thresholds measure 3/4 in (19 mm) high or less, and are beveled or modified to provide a beveled edge on each side, then they may be retained.

(iv) Toilet rooms. Where alterations to existing facilities make strict compliance with ANSI A117.1-1986, sections 4.22 and 4.23 (incorporated by reference, see Sec. 1190.31(a)) structurally impracticable, the addition of one "unisex" toilet per floor containing one water closet complying with ANSI A117.1-1986, section 4.16 and one lavatory complying with ANSI A117.1-1986, section 4.19, located adjacent to existing toilet facilities, will be acceptable in lieu of making existing toilet facilities for each sex accessible.

(v) Assembly areas.

(A) In alterations where it is structurally impracticable to disperse seating throughout the assembly area, seating may be located in collected areas as structurally feasible. Seating shall adjoin an accessible route that also serves as a means of emergency egress.

(B) In alterations where it is structurally impracticable to alter all performing areas to be on an accessible route, then at least one of each type shall be made accessible.

(3) If power-driven vertical access equipment (e.g., escalator) is planned or installed where none existed previously, or if new stairs (other than stairs installed to meet emergency exit requirements) requiring major structural changes are planned or installed where none existed previously, then a means of accessible vertical access shall be provided that complies with ANSI A117.1-1986, section 4.8, Ramps; ANSI A117.1-1986, section 4.10, Elevators; or ANSI

A117.1-1986, section 4.11, Platform Lifts (incorporated by reference, see Sec. 1190.31(a)) except to the extent where it is structurally impracticable in transit facilities. All elevator control buttons shall be at least 3/4 in (19 mm) in their smallest dimension. They shall be raised or flush.

(4) If alterations of single elements, when considered together, amount to an alteration of a space of a building or facility, the entire space shall be made accessible.

(b) Where a building or facility is vacated and it is totally altered, then it shall comply with Sec. 1190.31 Accessible buildings and facilities: New construction, except to the extent where it is structurally impracticable.

(c) Where substantial alteration occurs to a building or facility, then each element or space that is altered or added shall comply with the applicable provisions of Sec. 1190.31, Accessible buildings and facilities: New construction, except to the extent where it is structurally impracticable and the altered building or facility shall contain:

(1) At least one accessible route complying with ANSI A117.1-1986, section 4.3, Accessible Routes (incorporated by reference, see Sec. 1190.31(a)), and Sec. 1190.33(a);

(2) At least one accessible entrance complying with ANSI A117.1-1986, section 4.14, Entrances (incorporated by reference, see Sec. 1190.31(a).). If additional accessible entrances are altered, then they shall comply with Sec. 1190.33(a)(1); and

(3) The following toilet facilities, whichever number is greater:

(i) At least one toilet facility for each sex in the altered building complying with ANSI A117.1-1986, section 4.22, Toilet Rooms, Bathrooms, Bathing Facilities, and Shower Rooms (incorporated by reference, see Sec. 1190.31(a));

(ii) At least one toilet facility for each sex on each substantially altered floor, where such facilities are provided, complying with Sec. 1190.150, Toilet and bathing facilities.

In making the determination as to what constitutes "substantial alteration," the agency issuing standards for the facility shall consider the total cost of all alterations (including but not limited to electrical, mechanical, plumbing, and structural changes) for a building or facility within any twelve (12) month period. For guidance in implementing this provision, an alteration to any building or facility is to be considered substantial if the total cost for this twelve month period amounts to 50% or more of the full and fair cash value of the building as defined at Sec. 1190.3.

(4) Exception. If the cost of the elements and spaces required by Sec. 1190.33(c) (1), (2), and (3) exceeds 15% of the total cost of all other alterations, then a schedule may be established by the standard-setting and/or funding agency to provide the required improvements within a 5 year period.

(5) Exception. If the alteration is limited solely to the electrical, mechanical, or plumbing system and does not involve the alteration of any elements and

spaces required to be accessible under Part 1190, then Sec. 1190.33(c) does not apply.

(6) Exception. Consideration shall be given to providing accessible elements and spaces in each altered building or facility complying with:

(i) ANSI A117.1-1986, sections 4.6, Parking Spaces and Passenger Loading Zones, as modified by Sec. 1190.31(s)(1);

(ii) ANSI A117.1-1986, section 4.15, Drinking Fountains and Water Coolers;

(iii) ANSI A117.1-1986, section 4.23, Storage;

(iv) ANSI A117.1-1986, section 4.26, Alarms;

(v) ANSI A117.1-1986, section 4.29, Telephones;

(vi) ANSI A117.1-1986, section 4.30, Seating, Tables and Work Surfaces;

(vii) ANSI 4.31, Auditorium and Assembly Areas, as modified by Sec. 1190.31(s)(1). (Incorporated by reference, see Sec. 1190.31(a).)

(7) Exception: Mechanical rooms and other spaces which normally are not frequented by the public or employees of the facility or which by nature of their use are not required by the Architectural Barriers Act to be accessible are excepted from Sec. 1190.33(c) (1), (2), and (3).

[47 FR 33864, Aug. 4, 1982, as amended at 54 FR 5446, Feb. 3, 1989]

Sec. 1190.34 Accessible buildings and facilities: Leased.

(a) Buildings or facilities or portions thereof leased by the Federal Government shall comply with Sec. 1190.31, New construction, or shall incorporate the features listed in Sec. 1190.33(c), Alterations. Where both types of buildings are available for leasing, reasonable preference must be given to buildings or facilities complying with Sec. 1190.31, New construction.

(b) If space complying with paragraph (a) of this section is not available, space may be leased only if the space meets, or is altered to meet, the following conditions:

(1) At least one accessible route is provided from an accessible entrance complying with Sec. 1190.120, Entrances, to those areas in which the principal activities for which the building or facility was leased are conducted. Separate accessible routes may be provided to areas serving different groups of users (e.g., the public, employees).

(2) The accessible route shall comply with the requirements of Sec. 1190.50, Walks, floors, and accessible routes, and provide access to whatever accessible facilities are either required or provided, such as accessible toilets.

(i) Toilet facilities, to the extent required for the ready intended use of the building or facility, shall be provided as follows—

(A) Where more than one toilet for each sex is provided in a building or facility, at least one toilet facility which complies with Sec. 1190.150, Toilet and bathing facilities, shall be provided for each sex on each floor having toilets; or

(B) In a building or facility providing only one toilet for each sex, either one unisex toilet or one toilet for each sex complying with Sec. 1190.150 shall be provided; or

(C) In a building or facility where only one toilet is provided, one unisex toilet complying with Sec. 1190.150 shall be provided.

(ii) Parking facilities, if a parking area is included within the lease, shall be provided complying with Sec. 1190.60, Parking and passenger loading zones, to the extent feasible.

(3) Where an agency determines that an area does not require the provision of toilets or parking facilities for the users or occupants of that area, nothing in this section shall be construed to require the provision of any such facilities.

(4) Consideration shall be given to providing accessible elements and spaces in each altered building or facility complying with:

(i) Section 1190.160 Drinking fountains and water coolers;

(ii) Section 1190.180 Alarms;

(iii) Section 1190.210 Telephones;

(iv) Section 1190.220 Seating, tables, and work surfaces;

(v) Section 1190.230 Assembly areas; and

(vi) Section 1190.240 Storage.

(c) If space leased in accordance with the requirements of paragraph (a) or (b) of this section is subsequently altered, then the alterations shall comply with the requirements of Sec. 1190.33, Alterations.

(d) If space leased in accordance with the requirements of paragraph (a) or (b) of this section is increased by construction of an addition, the addition shall comply with Sec. 1190.32, Additions, to the extent it is leased by the Federal Government.

(e) If leased space at the time of leasing meets past or present state or local codes or the recommended standards of the American National Standards Institute (ANSI) A117.1 for accessibility to physically handicapped people, and provides the features required by this section, the space may be used as is or altered to comply with the technical requirements of paragraph (a) or (b) of this section.

(f) Once leased space in an existing building is accessible or is made accessible hereunder, no new accessibility alterations shall be required under this subpart except where alterations or additions are made to the building which are covered by paragraphs (c) and (d) of this section.

(g) Exceptions.

(1) If no space complying with paragraph (a) or (b) of this section is available for leasing, space as available may be leased without alterations:

(i) If the lease is necessary for officials servicing natural or human-made disasters on an emergency basis;

(ii) If the space is used on an intermittent basis; or

(iii) If the occupancy of the space is for no more than twelve months. If delays occur during the twelve months, the short- term lease may be extended for no more than an additional 12 months.

(2) Mechanical rooms and other spaces which normally are not frequented by the public or employees with handicaps of the occupant agency or which by nature of their use are not required to be accessible are excepted from this section.

[53 FR 35510, Sep. 14, 1988]

Subpart C—Technical Provisions

Sec. 1190.40 Technical specifications.

Features, elements and spaces required to be accessible by Sec. 1190.31, Sec. 1190.32, or Sec. 1190.33 shall meet the technical requirements specified in the provisions of sections 4.2 through 4.32 of ANSI A117.1-1986, "American National Standard for Buildings and Facilities—Providing Accessibility and Usability for Physically Handicapped People," which is incorporated herein by reference, except as noted herein. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. Copies may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, N.Y. 10018. Copies may be inspected at the office of the U.S. Architectural and Transportation Barriers Compliance Board, 1111 18th Street, NW., Suite 501, Washington, DC or at the Office of the Federal Register, 1100 L Street, NW., Room 8301, Washington, DC.

[54 FR 5447, Feb. 3, 1989]

Sec. 1190.50 Exceptions.

(a) In addition to ANSI A117.1-1986, section 4.10 (incorporated by reference, see Sec. 1190.31(a)), Elevators, the following requirement is added: Hall call buttons provided under ANSI A117.1-1986, section 4.10.3 shall be raised or flush.

(b) Under ANSI A117.1-1986, section 4.7 (incorporated by reference, see Sec. 1190.31(a)) Curb Ramps, and ANSI 117.1-1986, section 4.7.7, Warning Textures, and ANSI 117.1-1986, section 4.7.12, Uncurbed Intersections, shall not apply.

(c) In addition to ANSI A117.1-1986, section 4.28, Signage (incorporated by reference, see Sec. 1190.31(a)), there is added the requirement that interior tactile signage identifying rooms and spaces be located alongside the door on the latch side and be mounted at a height between 54 in and 66 in (1370 mm and 1675 mm) above the finished floor.

[54 FR 5447, Feb. 3, 1989]

Subpart D—Special Building or Facility Types or Elements

Sec. 1190.60 Special building or facility types.

The requirements specified in the Uniform Federal Accessibility Standards (UFAS) in sections 5, Restaurants and Cafeterias; 6, Health Care; 7, Mercantile; 8, Libraries; and 9, Postal Facilities, are deemed to satisfy minimum guidelines and requirements of the ATBCB for accessibility standards for those building and facility types.

[54 FR 5448, Feb. 3, 1989]

Appendix G

AMERICANS WITH DISABILITIES ACT OF 1990
(42 U.S.C. 12101-12213)

Sec. 1 Short Title; Table of Contents

(a) *Short Title.*—This Act may be cited as the "Americans with Disabilities Act of 1990."

(b) *Table of Contents.*—The table of contents is as follows:

Sec.

1. Short title; table of contents
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3. Definitions

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102. Discrimination
103. Defenses
104. Illegal use of drugs and alcohol
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305. Study
306. Regulations
307. Exemptions for private clubs and religious organizations
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TITLE IV—TELECOMMUNICATIONS

401. Telecommunications relay services for hearing-impaired and speech-impaired individuals
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TITLE V—MISCELLANEOUS PROVISIONS

501. Construction
502. State immunity
503. Prohibition against retaliation and coercion
504. Regulations by the Architectural and Transportation Barriers Compliance Board
505. Attorney's fees
506. Technical assistance
507. Federal wilderness areas
508. Transvestites
509. Congressional inclusion
510. Illegal use of drugs
511. Definitions
512. Amendments to the Rehabilitiation Act
513. Alternative means of dispute resolution
514. Severability

Sec. 2. Findings and Purposes.

(a) *Findings.*—The Congress finds that—

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individual with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existing of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) *Purpose.*—It is the purpose of this Act—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Sec. 3. Definitions.

As used in this Act:

(1) *Auxiliary Aids and Services.*—The term "auxiliary aids and services" includes—

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) *Disability.*—The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) *State.*—The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

TITLE I—EMPLOYMENT

Sec. 101. Definitions.

As used in this title:

(1) *Commission.*—The term "Commission" means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4).

(2) *Covered Entity.*—The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) *Direct Threat.*—The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) *Employee.*—The term "employee" means an individual employed by an employer.

(5) *Employer.*—

(A) *In General.*—The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) *Exceptions.*—The term "employer" does not include—

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(6) *Illegal Use of Drugs.*—

(A) *In General.*—The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) *Drugs.*—The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act.

(7) *Person, Etc.*—The terms "person," "labor organization," "employment agency," "commerce," and "industry affecting commerce," shall have the same meaning given such terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(8) *Qualified Individual With a Disability.*—The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) *Reasonable Accommodation.*—The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) *Undue Hardship.*—

(A) *In General.*—The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) *Factors To Be Considered.*—In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

(i) the nature and cost of the accommodation needed under this Act;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Sec. 102. Discrimination.

(a) *General Rule.*—No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) *Construction.*—As used in subsection (a), the term "discriminate" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) *Medical Examinations and Inquiries.—*

(1) *In General.—*The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(2) *Preemployment.—*

(A) *Prohibited Examination or Inquiry.—*Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) *Acceptable Inquiry.—*A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) *Employment Entrance Examination.—*A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this Act shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this title.

(4) *Examination and Inquiry.*—

(A) *Prohibited Examinations and Inquiries.*—A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) *Acceptable Examinations and Inquiries.*—A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) *Requirement.*—Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

Sec. 103. Defenses.

(a) *In General.*—It may be a defense to a charge of discrimination under this Act that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this title.

(b) *Qualification Standards.*—The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) *Religious Entities.*—

(1) *In General.*—This title shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) *Religious Tenets Requirement.*—Under this title, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(d) *List of Infectious and Communicable Diseases.*—

(1) *In General.*—The Secretary of Health and Human Services, not later than 6 months after the date of enactment of this Act, shall—

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissability to the general public.

Such list shall be updated annually.

(2) *Applications.*—In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) *Construction.*—Nothing in this Act shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissability published by the Secretary of Health and Human Services.

Sec. 104. Illegal Use of Drugs and Alcohol.

(a) *Qualified Individual With a Disability.*—For purposes of this title, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) *Rules of Construction.*—Nothing in subsection (a) shall be construed to exclude as a qualified individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) *Authority of Covered Entity.*—A covered entity—

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drugs use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that—

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions as industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) *Drug Testing.*—

(1) *In General.*—For purposes of this title, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) *Construction.*—Nothing in this title shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) *Transportation Employees.*—Nothing in this title shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to—

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c).

Sec. 105. Posting Notices.

Every employer, employment agency, labor organization, or joint labor-management committee covered under this title shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this Act, in the manner prescribed by section 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-10).

Sec. 106. Regulations.

Not later than 1 year after the date of enactment of this Act, the Commission shall issue regulations in an accessible format to carry out this title in accordance with subchapter II of chapter 5 of title 5, United States Code.

Sec. 107. Enforcement.

(a) *Powers, Remedies, and Procedures.*—The powers, remedies, and procedures set forth in sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9) shall be the powers, remedies, and procedures this title provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this Act, or regulations promulgated under section 106, concerning employment.

(b) *Coordination.*—The agencies with enforcement authority for actions which allege employment discrimination under this title and under the Rehabilitation Act of 1973 shall develop procedures to ensure that administrative complaints filed under this title and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this title and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General as part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this title and the Rehabilitation Act of 1973 not later than 18 months after the date of enactment of this Act.

Sec. 108. Effective Date.

This title shall become effective 24 months after the date of enactment.

TITLE II—PUBLIC SERVICES

Subtitle A—Prohibition Against Discrimination and Other Generally Applicable Provisions

Sec. 201. Definition.

As used in this title:

(1) *Public Entity.*—The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).

(2) *Qualified Individual With a Disability.*—The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Sec. 202. Discrimination.

Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Sec. 203. Enforcement.

The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202.

Sec. 204. Regulations.

(a) *In General.*—Not later than 1 year after the date of enactment of this Act, the Attorney General shall promulgate regulations in an accessible format that implement this subtitle, Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 223, 229, or 244.

(b) *Relationship to Other Regulations.*—Except for "program accessibility, existing facilities," and "communications," regulations under subsection (a) shall be consistent with this Act and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 504 of the Rehabilitation

Act of 1973 (29 U.S.C. 794). With respect to "program accessibility, existing facilities," and "communications," such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 504.

(c) *Standards.*—Regulations under subsection (a) shall include standards applicable to facilities and vehicles covered by this subtitle, other than facilities, stations, rail passenger cars, and vehicles covered by subtitle B. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 504(a) of this Act.

Sec. 205. Effective Date.

(a) *General Rule.*—Except as provided in subsection (b), this subtitle shall become effective 18 months after the date of enactment of this Act.

(b) *Exception.*—Section 204 shall become effective on the date of enactment of this Act.

Subtitle B—Actions Applicable to Public Transportation Provided by Public Entities Considered Discriminatory

PART I—PUBLIC TRANSPORTATION OTHER THAN BY AIRCRAFT OR CERTAIN RAIL OPERATIONS

Sec. 221. Definitions.

As used in this part:

(1) *Demand Responsive System.*—The term "demand responsive system" means any system of providing designated public transportation which is not a fixed route system.

(2) *Designated Public Transportation.*—The term "designated public transportation" means transportation (other than public school transportation) by bus, rail, or any other conveyance (other than transportation by aircraft or intercity or commuter rail transportation (as defined in section 241)) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

(3) *Fixed Route System.*—The term "fixed route system" means a system of providing designated public transportation on which a vehicle is operated along a prescribed route according to a fixed schedule.

(4) *Operates.*—The term "operates," as used with respect to a fixed route system or demand responsive system, includes operation of such system by a person under a contractual or other arrangement or relationship with a public entity.

(5) *Public School Transportation.*—The term "public school transportation" means transportation by schoolbus vehicles of schoolchildren, personnel, and equipment to and from a public elementary or secondary school and school-related activities.

(6) *Secretary.*—The term "Secretary" means the Secretary of Transportation.

Sec. 222. Public Entities Operating Fixed Route System.

(a) *Purchase and Lease of New Vehicles.*—It shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a public entity which operates a fixed route system to purchase or lease a new bus, a new rapid rail vehicle, a new light rail vehicle, or any other new vehicle to be used on such system, if the solicitation for such purchase or lease is made after the 30th day following the effective date of this subsection and if such bus, rail vehicle, or other vehicle is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(b) *Purchase and Lease of Used Vehicles.*—Subject to subsection (c)(1), it shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a public entity which operates a fixed route system to purchase or lease, after the 30th day following the effective date of this subsection, a used vehicle for use on such system unless such entity makes demonstrated good faith efforts to purchase or lease a used vehicle for use on such system that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(c) *Remanufactured Vehicles.*—

(1) *General Rule.*—Except as provided in paragraph (2), it shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a public entity which operates a fixed route system—

(A) to remanufacture a vehicle for use on such system so as to extend its usable life for 5 years or more, which remanufacture beings (or for which the solicitation is made) after the 30th day following the effective date of this subsection; or

(B) to purchase or lease for use on such system a remanufactured vehicle which has been remanufactured so as to extend its usable life for 5 years or more, which purchase or lease occurs after such 30th day and during the period in which the usable life is extended;

unless, after remanufacture, the vehicle is, to the maximum extent feasible, readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) *Exception for Historic Vehicles.*—

(A) *General Rule.*—If a public entity operates a fixed route system any segment of which is included on the National Register of Historic Places and if making a vehicle of historic character to be used solely on such segment readily accessible to and usable by individuals with disabilities would significantly alter the historic character of such vehicle, the public entity only has to make (or to purchase or lease a remanufactured vehicle with) those modifications which are necessary to meet the requirements of paragraph (1) and which do not significantly alter the historic character of such vehicle.

(B) *Vehicles of Historic Character Defined by Regulations.*—For purposes of this paragraph and section 228(b), a vehicle of historic character shall be defined by the regulations issued by the Secretary to carry out this subsection.

Sec. 223. **Paratransit as a Complement to Fixed Route Service.**

(a) *General Rule.*—It shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a public entity which operates a fixed route system (other than a system which provides solely commuter bus service) to fail to provide with respect to the operations of its fixed route system, in accordance with this section, paratransit and other special transportation services to individuals with disabilities, including individuals who use wheelchairs, that are sufficient to provide to such individuals a level of service (1) which is comparable to the level of designated public transportation services provided to individuals without disabilities using such system; or (2) in the case of response time, which is comparable, to the extent practicable, to the level of designated public transportation services provided to individuals without disabilities using such system.

(b) *Issuance of Regulations.*—Not later than 1 year after the effective date of this subsection, the Secretary shall issue final regulations to carry out this section.

(c) *Required Contents of Regulations.*—

(1) *Eligible Recipients of Service.*—The regulations issued under this section shall require each public entity which operates a fixed route system to provide the paratransit and other special transportation services required under this section—

(A)(i) to any individual with a disability who is unable, as a result of a physical or mental impairment (including a vision impairment) and without the assistance of another individual (except an operator of a wheelchair lift or other boarding assistance device), to board, ride, or disembark from any vehicle on the system which is readily accessible to and usable by individuals with disabilities;

(ii) to any individual with a disability who needs the assistance of a wheelchair lift or other boarding assistance device (and is able with such assistance) to board, ride, and disembark from any vehicle which is readily accessible to and usable by individuals with disabilities if the individual wants to travel on a route on the system during the hours of operation of the system at a time (or within a reasonable period of such time) when such a vehicle is not being used to provide designated public transportation on the route; and

(iii) to any individual with a disability who has a specific impairment-related condition which prevents such individual from traveling to a boarding location or from a disembarking location on such system;

(B) to 1 other individual accompanying the individual with the disability; and

(C) to other individuals, in addition to the one individual described in subparagraph (B), accompanying the individual with a disability provided that space for these additional individuals is available on the paratransit vehicle carrying the individual with a disability and that the transportation of such additional individuals will not result in a denial of service to individuals with disabilities.

For purposes of clauses (i) and (ii) of subparagraph (A), boarding or disembarking from a vehicle does not include travel to the boarding location or from the disembarking location.

(2) *Service Area.*—The regulations issued under this section shall require the provision of paratransit and special transportation services required under this section in the service area of each public entity which operates a fixed route system, other than any portion of the service area in which the public entity solely provides commuter bus service.

(3) *Service Criteria.*—Subject to paragraphs (1) and (2), the regulations issued under this section shall establish minimum service criteria for determining the level of services to be required under this section.

(4) *Undue Financial Burden Limitation.*—The regulations issued under this section shall provide that, if the public entity is able to demonstrate to the satisfaction of the Secretary that the provision of paratransit and other special transportation services otherwise required under this section would impose an undue financial burden on the public entity, notwithstanding any other provision of this section (other than paragraph (5)), shall only be required to provide such services to the extent that providing such services would not impose such a burden.

(5) *Additional Services.*—The regulations issued under this section shall establish circumstances under which the Secretary may require a public entity to provide, notwithstanding paragraph (4), paratransit and other special transportation services under this section beyond the level of paratransit and other special transportation services which would otherwise be required under paragraph (4).

(6) *Public Participation.*—The regulations issued under this section shall require that each public entity which operates a fixed route system hold a public hearing, provide an opportunity for public comment, and consult with individuals with disabilities in preparing its plan under paragraph (7).

(7) *Plans.*—The regulations issued under this section shall require that each public entity which operates a fixed route system—

(A) within 18 months after the effective date of this subsection, submit to the Secretary, and commence implementation of, a plan for providing paratransit and other special transportation services which meets the requirements of this section; and

(B) on an annual basis thereafter, submit to the Secretary, and commence implementation of, a plan for providing such services.

(8) *Provision of Services by Others.*—The regulations issued under this section shall—

(A) require that a public entity submitting a plan to the Secretary under this section identify in the plan any person or other public entity which is providing a paratransit or other special transportation service for individuals with disabilities in the service area to which the plan applies; and

(B) provide that the public entity submitting the plan does not have to provide under the plan such service for individuals with disabilities.

(9) *Other Provisions.*—The regulations issued under this section shall include such other provisions and requirements as the Secretary determines are necessary to carry out the objectives of this section.

(d) *Review of Plan.*—

(1) *General Rule.*—The Secretary shall review a plan submitted under this section for the purpose of determining whether or not such plan meets the requirements of this section, including the regulations issued under this section.

(2) *Disapproval.*—If the Secretary determines that a plan reviewed under this subsection fails to meet the requirements of this section, the Secretary shall disapprove the plan and notify the public entity which submitted the plan of such disapproval and the reasons therefor.

(3) *Modification of Disapproved Plan.*—Not later than 90 days after the date of disapproval of a plan under this subsection, the public entity which submitted the plan shall modify the plan to meet the requirements of this section and shall submit to the Secretary, and commence implementation of, such modified plan.

(e) *Discrimination Defined.*—As used in subsection (a), the term "discrimination" includes—

(1) a failure of a public entity to which the regulations issued under this section apply to submit, or commence implementation of, a plan in accordance with subsections (c)(6) and (c)(7);

(2) a failure of such entity to submit, or commence implementation of, a modified plan in accordance with subsection (d)(3);

(3) submission to the Secretary of a modified plan under subsection (d)(3) which does not meet the requirements of this section; or

(4) a failure of such entity to provide paratransit or other special transportation services in accordance with the plan or modified plan the public entity submitted to the Secretary under this section.

(f) *Statutory Construction.*—Nothing in this section shall be construed as preventing a public entity—

(1) from providing paratransit or other special transportation services at a level which is greater than the level of such services which are required by this section,

(2) from providing paratransit or other special transportation services in addition to those paratransit and special transportation services required by this section, or

Appendix H

EDUCATION FOR ALL HANDICAPPED CHILDREN ACT
(20 U.S.C. 1400-1485)

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EDUCATION OF THE HANDICAPPED ACT
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[P.L. 91-230, April 13, 1970, 84 Stat. 121; as amended by P.L. 93-380, August 21, 1974, 88 Stat. 580, by P.L. 94-1142, November 29, 1975, 89 Stat. 773, by Pub. L. 95-561, November 1, 1978, 92 Stat. 2364, by Pub. L. 98-199, December 2, 1983, 97 Stat. 1357, by Pub. L. 99-372, August 5, 1986, 100 Stat. 796, by Pub. L. 99-457, Oct. 8, 1986, 100 Stat. 1145, and by Pub. L. 100- 630, Nov. 7, 1988, 102 Stat. 3289.]

Part A–General Provisions

Sec. 1400. Congressional statements and declarations

SHORT TITLE

(a) This chapter may be cited as the "Education of the Handicapped Act."

FINDINGS

(b) The Congress finds that–

(1) there are more than eight million handicapped children in the United States today;

(2) the special educational needs of such children are not being fully met;

(3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;

(8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and

(9) it is in the National interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

PURPOSE

(c) It is the purpose of this chapter to assure that all handicapped children have available to them, within the time periods specified in Section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

Pub. L. 91-230, Title VI, Sec. 601, Apr. 13, 1970, 84 Stat. 175, amended by Pub. L. 94-142, Sec. 3(a), Nov. 29, 1975, 89 Stat. 774 [reclassified as Sec. 1400 in 1981].

Sec. 1401. Definitions

(a) As used in this chapter–

(1) The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

* Former subsections (a)(2) and (a)(3) were deleted; however, subsections (a)(4)-(a)(22) were not renumbered.

(4) The term "construction," except where otherwise specified, means (A) erection of new or expansion of existing structures, and the acquisition and installation of equipment therefor; or (B) acquisition of existing structures not owned by any agency or institution making application for assistance under this chapter; or (C) remodeling or alteration (including the acquisition, installation, modernization, or replacement of equipment) of existing structures; or (D) acquisition of land in connection with the activities in clauses (A), (B), and (C); or (E) a combination of any two or more of the foregoing.

(5) The term "equipment" includes machinery, utilities, and built-in equipment and any necessary enclosures or structures to house them, and includes all other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture, printed, published, and audio-visual instructional materials, telecommunications, sensory, and other technological aids and devices, and books, periodicals, documents, and other related materials.

(6) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

(7) The term "State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(8) The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(9) The term "elementary school" means a day or residential school which provides elementary education, as determined under State law.

(10) The term "secondary school" means a day or residential school which provides secondary education, as determined under State law, except that it does not include any education provided beyond grade 12.

(11) The term "institution of higher education" means an educational institution in any State which–

(A) admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

(B) is legally authorized within such State to provide a program of education beyond high school;

(C) provides an educational program for which it awards a bachelor's degree, or provides not less than a two- year program which is acceptable for full credit toward such a degree, or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge;

(D) is a public or other nonprofit institution; and

(E) is accredited by a nationally recognized accrediting agency or association listed by the Commissioner pursuant to this paragraph or, if not so accredited, is an institution whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited: *Provided, however,* That in the case of an institution offering a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge, if the Commissioner determines that there is no nationally recognized accrediting agency or association qualified to accredit such institutions, the Secretary shall appoint an advisory committee, composed of persons specially qualified to evaluate training provided by such institutions, which shall prescribe the standards of content, scope, and quality which must be met in order to qualify such institutions to participate under this Act and shall also determine whether particular institutions meet such standards. For the purposes of this paragraph the Commissioner shall publish a list of nationally recognized accrediting agencies or associations which the Secretary determines to be reliable authority as to the quality of education or training offered.

(F) The term includes community colleges receiving funding from the Secretary of the Interior under the Tribally Controlled Community College Assistance Act of 1978.

(12) The term "nonprofit" as applied to a school, agency, organization, or institution means a school, agency, organization, or institution owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(13) The term "research and related purposes" means research, research training (including the payment of stipends and allowances), surveys, or demonstrations in the field of education of handicapped children, or the dissemination of information derived therefrom, including (but without limitation) experimental schools.

(14) The term "Secretary" means the Secretary of Education.

(15) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

(18) The term "free appropriate public education" means special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 614(a)(5) of this title.

(19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

(20) The term "excess costs" means those costs which are in excess of the average annual per student expenditure in a local educational agency during the preceding school year for an elementary or secondary school student, as may be appropriate, and which shall be computed after deducting (A) amounts received (i) under this part, (ii) under chapter 1 of title I of the Elementary and Secondary Education Act of 1965, or (iii) under title VII of the Elementary and Secondary Education Act of 1965, and (B) any State or local funds expended for programs which would qualify for assistance under such part, subchapter or under such titles.

(21) The term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act.

(22) The term "intermediate educational unit" means any public authority, other than a local educational agency, which is under the general supervision of a State educational agency, which is established by State law for the purpose of providing free public education on a regional basis, and which provides special education and related services to handicapped children within that State.

(23) (A) The term "public or private nonprofit agency or organization" includes an Indian tribe. (B) The terms "Indian," "American Indian," and "Indian American" mean an individual who is a member of an Indian tribe. (C) The term "Indian tribe" means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaskan native village or regional village corporation (as defined in or established under the Alaska Native Claims Settlement Act).

(b) For purposes of part C of this title, "handicapped youth" means any handicapped child (as defined in subsection (a)(1)) who–

(1) is twelve years of age or older; or

(2) is enrolled in the seventh or higher grade in school.

Note: (a) Except as provided in subsection (b), the provisions of this Act shall take effect on the date of enactment of this Act.

(b)(1) To the extent that the amendments made by this Act to parts C, D, E, and G of the Education of the Handicapped Act prohibit or limit the use of funds, such amendments shall apply only to funds obligated after the date of enactment of this Act.

(2) As determined necessary by the Secretary of Education for purposes of providing services under the Education of the Handicapped Act pending the issuance of regulations implementing the amendments made by this Act, the Secretary shall provide financial assistance under parts C, D, E, and G of the Act as in effect on the day before the date of enactment of this Act until issuance of such regulations or March 1, 1984, whichever is earlier.

Pub. L. 91-230, Title VI, Sec. 602, Apr. 13, 1970, 84 Stat. 175; amended by Pub. L. 94-142, Sec. 4(a), Nov. 29, 1975, 89 Stat. 775, Pub. L. 98-199, Sec. 2, Dec. 2, 1983, 97 Stat. 1357, and by Pub. L. 99-457, Title IV, Sec. 402, Oct. 8, 1986, 100 Stat. 1172.

Sec. 1402. Office of Special Education Programs

(a) There shall be, within the Office of Special Education and Rehabilitative Services in the Department of Education, an Office of Special Education Programs which shall be the principal agency in the Department for administering and carrying out this Act and other programs and activities concerning the education and training of the handicapped.

(b)(1) The office established under subsection (a) shall be headed by a Deputy Assistant Secretary who shall be selected by the Secretary and shall report directly to the Assistant Secretary for Special Education and Rehabilitative Services. The position of Deputy Assistant Secretary shall be in grade GS-18 of the General Schedule under section 5104 of title 5, United States Code, and shall be a Senior Executive Service position for the purposes of section 3182(a)(2) of such title.

(2) In addition to such Deputy Assistant Secretary, there shall be established in such office not less than six positions for persons to assist the Deputy Assistant Secretary, including the position of the Associate Deputy Assistant Secretary. Each such position shall be in grade GS-15 of the General Schedule under section 5104 of title 5, United States Code.

Pub. L. 91-230, Title VI, Sec. 603, Apr. 13, 1970, 84 Stat. 177; amended by Pub. L. 93-380, Title VI, Sec. 612(a), Aug. 21, 1974, 88 Stat. 579, and by Pub. L. 98-199, Sec. 3(a), Dec. 2, 1983, 97 Stat. 1357.

Sec. 1403. National Advisory Committee on Handicapped Children and Youth

Repealed by Pub. L. 99-457, Title IV, Sec. 407, Oct. 8, 1986, 100 Stat. 1177.

Sec. 1404. Acquisition of equipment and construction of necessary facilities

AUTHORIZATION FOR USE OF FUNDS

(a) In the case of any program authorized by this chapter, if the Secretary determines that such program will be improved by permitting the funds authorized for such program to be used for the acquisition of equipment and the construction of necessary facilities, the Secretary may authorize the use of such funds for such purposes.

RECOVERY OF PAYMENTS UNDER CERTAIN CONDITIONS

(b) If, within twenty years after the completion of any construction (except minor remodeling or alteration) for which funds have been paid pursuant to a grant or contract under this chapter the facility constructed ceases to be used for the purposes for which it was constructed, the United States, unless the Secretary determines that there is good cause for releasing the recipient of the funds from its obligation, shall be entitled to recover from the applicant or other owner of the facility an amount which bears the same ratio to the then value of the facility as the amount of such Federal funds bore to the cost of the portion of the facility financed with such funds. Such value shall be determined by agreement of the parties or by action brought in the United States district court for the district in which the facility is situated.

Pub. L. 91-230, Title VI, Sec. 605, Apr. 13, 1970, 84 Stat. 177.

Sec. 1405. Employment of handicapped individuals

The Secretary shall assure that each recipient of assistance under this chapter shall make positive efforts to employ and advance in employment qualified handicapped individuals in programs assisted under this chapter.

Pub. L. 91-230, Title VI, Sec. 606, as added Pub. L. 94-142, Sec. 6(a), Nov. 29, 1975, 89 Stat. 795.

Sec. 1406. Grants for the removal of architectural barriers

(a) The Secretary is authorized to make grants and to enter into cooperative agreements with the Secretary of the Interior and with State educational agencies to assist such agencies in making grants to local educational agencies or intermediate educational units to pay part or all of the cost of altering existing buildings and equipment in accordance with standards promulgated under the Act entitled 'An Act to insure that certain buildings financed with Federal funds are so designated and constructed as to be accessible to the physically handicapped,' approved August 12, 1968.

(b) For the purposes of carrying out the provisions of this section, there are authorized to be appropriated such sums as may be necessary.

Pub. L. 91-230, Title VI, Sec. 607, as added by Pub. L. 94-142, Sec. 6(a), Nov. 29, 1975, 89 Stat. 795, and amended by Pub. L. 98-199, Sec. 5, Dec. 2, 1983, 97 Stat. 1358, and by Pub. L. 99-457, Title IV, Sec. 401, Oct. 8, 1986, 100 Stat. 1172.

Sec. 1407. Requirements for prescribing regulations

(a) For purposes of complying with section 431(b) of the General Education Provisions Act with respect to regulations promulgated under part B of this Act, the thirty-day period under such section shall be ninety days.

(b) The Secretary may not implement, or publish in final form, any regulation prescribed pursuant to this Act which would procedurally or substantively lessen the protections provided to handicapped children under this Act, as embodied in regulations in effect on July 20, 1983 (particularly as such protections relate to parental consent to initial evaluation or initial placement in special education, least restrictive environment, related services, timelines, attendance of evaluation personnel at individualized education program meetings, or qualifications of personnel), except to the extent that such regulation reflects the clear and unequivocal intent of the Congress in legislation.

Pub. L. 91-230, Title VI, Sec. 608, as added by Pub. L. 98-199, Sec. 6, Dec. 2, 1983, 97 Stat. 1359.

Sec. 1408. Eligibility for Financial Assistance

Effective for fiscal years for which the Secretary may make grants under section 1419(b)(1), no State or local educational agency or intermediate educational unit or other public institution or agency may receive a grant under parts C through G which relate exclusively to programs, projects, and activities pertaining to children aged three to five, inclusive, unless the State is eligible to receive a grant under section 1419(b)(1).< Pub. L. 99-457, Title II, Sec. 202, Oct. 8, 1986, 100 Stat. 1158.

Part B–Assistance For Education Of All Handicapped Children

Sec. 1411. Entitlements and allocations

FORMULA FOR DETERMINING MAXIMUM STATE ENTITLEMENT

(a)(1) Except as provided in paragraph (3) and in section 1419 of this title, the maximum amount of the grant to which a State is entitled under this subchapter for any fiscal year shall be equal to–

(A) the number of handicapped children aged three to five, inclusive, in a State who are receiving special education and related services as determined under paragraph (3) if the State is eligible for a grant under section 1419 and the number of handicapped children aged six through 21, inclusive, in a State who are receiving special education and related services as so determined; multiplied by–

(B)(i) 5 per centum, for the fiscal year ending September 30, 1978, of the average per pupil expenditure in public elementary and secondary schools in the United States;

(ii) 10 per centum, for the fiscal year ending September 30, 1979, of the average per pupil expenditure in public elementary and secondary schools in the United States;

(iii) 20 per centum, for the fiscal year ending September 30, 1980, of the average per pupil expenditure in public elementary and secondary schools in the United States;

(iv) 30 per centum, for the fiscal year ending September 30, 1981, of the average per pupil expenditure in public elementary and secondary schools in the United States; and

(v) 40 per centum, for the fiscal year ending September 30, 1982, and for each fiscal year thereafter, of the average per pupil expenditure in public elementary and secondary schools in the United States;

except that no State shall receive an amount which is less than the amount which such State received under this subchapter for the fiscal year ending September 30, 1977.

(2) For the purposes of this subsection and subsection (b) through subsection (e) of this section, the term "State" does not include Guam, American Samoa, the Virgin Islands, Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(3) The number of handicapped children receiving special education and related services in any fiscal year shall be equal to the number of such children receiving special education and related services on December 1 of the fiscal year preceding the fiscal year for which the determination is made.

(4) For purposes of paragraph (1)(B), the term "average per pupil expenditure," in the United States, means the aggregate current expenditures, during the second fiscal year preceding the fiscal year for which the computation is made (or, if satisfactory data for such year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the United States (which, for purposes of this subsection, means the fifty States and the District of Columbia), as the case may be, plus any direct expenditures by the State for operation of such agencies (without regard to the source of funds from which either of such expenditures is made), divided by the aggregate number of children in average daily attendance to whom such agencies provided free public education during such preceding year.

(5)(A) In determining the allotment of each State under paragraph (1), the Secretary may not count–

(i) handicapped children aged three to seventeen, inclusive, in such State under paragraph (1)(A) to the extent the number of such children is greater than 12 per cent of the number of all children aged five to seventeen, inclusive, in such State and the State serves all handicapped children aged three to five, inclusive, in the State pursuant to State law or practice or the order of any court,

(ii) handicapped children aged five to seventeen, inclusive, in such state under paragraph (1)(A) to the extent the number of such children is greater than 12 percent of the number of all children aged five to seventeen, inclusive, in such State and the State does not serve all handicapped children aged three to five, inclusive, in the State pursuant to State law or practice on the order of any court; and

(iii) handicapped children who are counted under subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965.

(B) For purposes of subparagraph (A), the number of children aged three to seventeen, inclusive, in any State shall be determined by the Secretary on the basis of the most recent satisfactory data available to the Secretary.

DISTRIBUTION AND USE OF GRANT FUNDS BY STATES FOR FISCAL YEAR ENDING SEPTEMBER 30, 1978

(b)(1) Of the funds received under subsection (a) of this section by any State for the fiscal year ending September 30, 1978–

(A) 50 per centum of such funds may be used by such State in accordance with the provisions of paragraph (2); and

(B) 50 per centum of such funds shall be distributed by such State pursuant to subsection (d) of this section to local educational agencies and intermediate educational units in such State, for use in accordance with the priorities established under section 1412(3) of this title.

(2) Of the funds which any State may use under paragraph (1)(A)–

(A) an amount which is equal to the greater of–

(i) 5 per centum of the total amount of funds received under this subchapter by such State; or

(ii) $200,000

may be used by such State for administrative costs related to carrying out sections 1412 and 1413 of this title;

(B) the remainder shall be used by such State to provide support services and direct services, in accordance with the priorities established under section 1412(3) of this title.

DISTRIBUTION AND USE OF GRANT FUNDS BY STATES FOR FISCAL YEARS ENDING SEPTEMBER 30, 1979, AND THEREAFTER

(c)(1) Of the funds received under subsection (a) of this section by any State for the fiscal year ending September 30, 1979, and for each fiscal year thereafter–

(A) 25 per centum of such funds may be used by such State in accordance with the provisions of paragraph (2); and

(B) except as provided in paragraph (4), 75 per centum of such funds shall be distributed by such State pursuant to subsection (d) of this section to local educational agencies and intermediate educational units in such State, for use in accordance with priorities established under section 1412(3) of this title.

(2)(A) Subject to the provisions of subparagraph (B), of the funds which any State may use under paragraph (1)(A)–

(i) an amount which is equal to the greater of–

(I) 5 per centum of the total amount of funds received under this subchapter by such State; or

(II) $350,000

may be used by such State for administrative costs related to carrying out the provisions of sections 1412 and 1413 of this title; and

(ii) the part remaining after use in accordance with clause (i) shall be used by the State (I) to provide support services and direct services in accordance with the priorities established under section 1412(3), and (II) for the administrative costs of monitoring and complaint investigation but only to the extent that such costs exceed the costs of administration incurred during fiscal year 1985.

(B) The amount expended by any State from the funds available to such State under paragraph (1)(A) in any fiscal year for the provision of support services or for the provision of direct services shall be matched on a program basis by such State, from funds other than Federal funds, for the provision of support services or for the provision of direct services for the fiscal year involved.

(3) The provisions of section 1413(a)(9) of this title shall not apply with respect to amounts available for use by any State under paragraph 2.

(4)(A) No funds shall be distributed by any State under this subsection in any fiscal year to any local educational agency or intermediate educational unit in such State if–

(i) such local educational agency or intermediate educational unit is entitled, under subsection (d) of this section, to less than $7,500 for such fiscal year; or

(ii) such local educational agency or intermediate educational unit has not submitted an application for such funds which meets the requirements of section 1414 of this title.

(B) Whenever the provisions of subparagraph (A) apply, the State involved shall use such funds to assure the provision of a free appropriate education to handicapped children residing in the area served by such local educational agency or such intermediate educational unit. The provisions of paragraph (2)(B) shall not apply to the use of such funds.

ALLOCATION OF FUNDS WITHIN STATES TO LOCAL EDUCATIONAL AGENCIES AND INTERMEDIATE EDUCATIONAL UNITS

(d) From the total amount of funds available to local educational agencies and intermediate educational units in any State under subsection (b)(1)(B) or subsection (c)(1)(B) of this section, as the case may be, each local educational agency and intermediate educational unit shall be entitled to an amount which bears the same ratio to the total amount available under subsection (b)(1)(B) or subsection (c)(1)(B) of this section, as the case may be, as the number of handicapped children aged three to twenty-one, inclusive, receiving special education and related services in such local educational agency or intermediate educational unit bears to the aggregate number of handicapped children aged three to twenty-one, inclusive, receiving special education and related services in all local educational agencies and intermediate educational units which apply to the State educational agency involved for funds under this subchapter.

TERRITORIES AND POSSESSIONS

(e)(1) The jurisdictions to which this subsection applies are Guam, American Samoa, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(2) Each jurisdiction to which this subsection applies shall be entitled to a grant for the purposes set forth in section 601(c) in an amount equal to an amount determined by the Secretary in accordance with criteria based on respective needs, except that the aggregate of the amount to which such jurisdictions are so entitled for any fiscal year shall not exceed an amount equal to 1 per centum of the aggregate amounts available to all States under this subchapter for that fiscal year. If the aggregate of the amounts, determined by the Secretary pursuant to the preceding sentence, to be so needed for any fiscal year exceeds an amount equal to such 1 per centum limitation, the entitlement of such jurisdictions shall be reduced proportionately until such aggregate does not exceed such 1 per centum limitation.

(3) The amount expended for administration by each jurisdiction under this subsection shall not exceed 5 per centum of the amount allotted to such jurisdiction for any fiscal year, or $35,000, whichever is greater.

INDIAN RESERVATIONS

(f)(1) The Secretary may make payments to the Secretary of the Interior according to the need for assistance for the education of handicapped children on reservations served by elementary and secondary schools operated for Indian children by the Department of the Interior. The amount of such payment for any fiscal year shall not exceed 1.25 percent of the aggregate amounts available to all States under this subchapter for that fiscal year.

(2) The Secretary of the Interior may receive an allotment under paragraph (1) only after submitting to the Secretary an application which–

(A) meets the applicable requirements of sections 1412, 1413, and 1414(a),

(B) includes satisfactory assurance that all handicapped children aged 3 to 5, inclusive, receive a free appropriate public education by or before the 1987-1988 school year,

(C) includes an assurance that there are public hearings, adequate notice of such hearings, and an opportunity for comment afforded to members of tribes, tribal governing bodies, and designated local school boards before adoption of the policies, programs, and procedures required under sections 1412, 1413, and 1414(a), and

(D) is approved by the Secretary.

Section 1416 shall apply to any such application.

REDUCTIONS OR INCREASES

(g)(1) If the sums appropriated under subsection (h) for any fiscal year for making payments to States under subsection (a) are not sufficient to pay in full the total amounts which all States are entitled to receive under subsection (a) for such fiscal year, the maximum amounts which all States are entitled to receive under subsection (a) for such fiscal year shall be ratably reduced. In case additional funds become available for making such payments for any fiscal year during which the preceding sentence is applicable, such reduced amounts shall be increased on the same basis as they were reduced.

(2) In the case of any fiscal year in which the maximum amounts for which States are eligible have been reduced under the first sentence of paragraph (1), and in which additional funds have not been made available to pay in full the total of such maximum amounts under the last sentence of such paragraph, the State educational agency shall fix dates before which each local educational agency or intermediate educational unit shall report to the State educational agency on the amount of funds available to the local educational agency or intermediate educational unit, under the provisions of subsection (d) of this section, which it estimates that it will expend in accordance with the provisions

of this section. The amounts so available to any local educational agency or intermediate educational unit, or any amount which would be available to any other local educational agency or intermediate educational unit if it were to submit a program meeting the requirements of this subchapter, which the State educational agency determines will not be used for the period of its availability, shall be available for allocation to those local educational agencies and intermediate educational units, in the manner provided by this section, which the State educational agency determines will need and be able to use additional funds to carry out approved programs.

(h) For grants under subsection (a) there are authorized to be appropriated such sums as may be necessary.

Pub. L. 91-230, Title VI, Sec. 611, Apr. 13, 1970, 84 Stat. 178; amended by Pub. L. 93-380, Title VI, Secs. 614(a), (e)(1), (2), Aug. 21, 1974, 88 Stat. 580, 582; Pub. L. 94-142, Secs. 2(a)(1)-(3), 5(a), (c), Nov. 29, 1975, 89 Stat. 773, 776, 794; Pub. L. 96-270, Sec. 13, June 14, 1980; Pub. L. 98-199, Sec. 15, Dec. 2, 1983, 97 Stat. 1357; and by Pub. L. 99-457, Title II, Sec. 201, and Title IV, Secs. 403, 404, Oct. 8, 1986, 100 Stat. 1155 and 1173.

Sec. 1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that–

(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under section 1417(c) of this title; and

(E) any amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Secretary.

(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 1414(a)(5) of this title.

(5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency. This paragraph shall not be construed to limit the responsibility of agencies other than educational agencies in a State from provid-

ing or paying for some or all of the costs of a free appropriate public education to be provided handicapped children in the State.

(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 1413 of this title.

Pub. L. 91-230, Title VI, Sec. 612, Apr. 13, 1970, 84 Stat. 178; amended by Pub. L. 92-318, Title IV, Sec. 421(b)(1)(C), June 23, 1972, 86 Stat. 341; Pub. L. 93-380, Title Secs. 614(b), (f)(1), 615(a), Title VIII, Sec. 843(b), Aug. 21, VI, 1974, 88 Stat. 581, 582, 611; Pub. L. 94-142, Secs. 2(a)(4), (c), (d), 5(a), Nov. 29, 1975, 89 Stat. 773, 774, 780; and by Pub. L. 99-457, Title II, Sec. 203, Oct. 8, 1986, 100 Stat. 1158.

Sec. 1413. State Plans

REQUISITE FEATURES

(a) Any State meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as he deems necessary. Each such plan shall–

(1) set forth policies and procedures designed to assure that funds paid to the State under this subchapter will be expended in accordance with the provisions of this subchapter, with particular attention given to the provisions of sections 1411(b), 1411(c), 1411(d), 1412(2) and 1412(3) of this title;

(2) provide that programs and procedures will be established to assure that funds received by the State or any of its political subdivisions under any other Federal program, including section 241c-1 of this title, section 844a(b)(8) of this title or its successor authority, and section 1262(a)(4)(B) of this title, under which there is specific authority for the provision of assistance for the education of handicapped children, will be utilized by the State, or any of its political subdivisions, only in a manner consistent with the goal of providing a free appropriate public education for all handicapped children, except that nothing in this clause shall be construed to limit the specific requirements of the laws governing such Federal programs;

(3) set forth, consistent with the purposes of this chapter, a description of programs and procedures for (A) the development and implementation of a comprehensive system of personnel development which shall include (i) inservice training of general and special educational instructional and support personnel, (ii) detailed procedures to assure that all personnel necessary to carry out the purposes of this Act are appropriately and adequately prepared and trained, and (iii) effective procedures for acquiring and disseminating to teachers

and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and (B) adopting, where appropriate, promising educational practices and materials development through such projects;

(4) set forth policies and procedures to assure–

(A) that, to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services; and

(B) that (i) handicapped children in private schools and facilities will be provided special education and related services (in conformance with an individualized educational program as required by this part) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all handicapped children within such State, and (ii) in all such instances the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;

(5) set forth policies and procedures which assure that the State shall seek to recover any funds made available under this subchapter for services to any child who is determined to be erroneously classified as eligible to be counted under section 1411(a) or 1411(d) of this title;

(6) provide satisfactory assurance that the control of funds provided under this subchapter, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property;

(7) provide for (A) making such reports in such form and containing such information as the Secretary may require to carry out the Secretary's functions under this part, and (B) keeping such records and affording such access thereto as the Secretary may find necessary to assure the correctness and verification of such reports and proper disbursement of Federal funds under this part;

(8) provide procedures to assure that final action with respect to any application submitted by a local educational agency or an intermediate educational unit shall not be taken without first affording the local educational agency or intermediate educational unit involved reasonable notice and opportunity for a hearing;

(9) provide satisfactory assurance that Federal funds made available under this part (A) will not be commingled with State funds, and (B) will be so used as to supplement and increase the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to handi-

capped children under this part and in no case to supplant such Federal, State, and local funds, except that, where the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Secretary may waive in part the requirement of this subparagraph if the Secretary concurs with the evidence provided by the State;

(10) provide consistent with procedures prescribed pursuant to section 1417(a)(2) of this title, satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this subchapter to the State, including any such funds paid by the State to local educational agencies and intermediate educational units;

(11) provide for procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children (including evaluation of individualized education programs), in accordance with such criteria that the Secretary shall prescribe pursuant to section 1417 of this title;

(12) provide that the State has an advisory panel, appointed by the Governor or any other official authorized under State law to make such appointments, composed of individuals involved in or concerned with the education of handicapped children, including handicapped individuals, teachers, parents or guardians of handicapped children, State and local education officials, and administrators of programs for handicapped children, which (A) advises the State educational agency of unmet needs within the State in the education of handicapped children, (B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of handicapped children and the procedures for distribution of funds under this part, and (C) assists the State in developing and reporting such data and evaluations as .nay assist the Secretary in the performance of the responsibilities of the Secretary under section 1418 of this title;

(13) set forth policies and procedures for developing and implementing interagency agreements between the State educational agency and other appropriate State and local agencies to (A) define the financial responsibility of each agency for providing handicapped children and youth with free appropriate public education, and (B) resolve interagency disputes, including procedures under which local educational agencies may initiate proceedings under the agreement in order to secure reimbursement from other agencies or otherwise implement the provisions of this agreement; and;

(14) policies and procedures relating to the establishment and maintenance of standards to ensure that personnel necessary to carry out the purposes of this subchapter are appropriately and adequately prepared and trained including–

(A) set forth the establishment and maintenance of standards which are consistent with any State approved or recognized certification, licensing, registration, or other comparable requirements which apply to the area in which such personnel are providing special education or related services, and

(B) to the extent such standards are not based on the highest requirements in the State applicable to a specific profession or discipline, the steps the State is taking to require the retraining or hiring of personnel that meet appropriate professional requirements in the State.

ADDITIONAL ASSURANCES

(b) Whenever a State educational agency provides free appropriate public education for handicapped children, or provides direct services to such children, such State educational agency shall include, as part of the State plan required by subsection (a) of this section, such additional assurances not specified in such subsection (a) of this section as are contained in section 1414(a) of this title, except that funds available for the provision of such education or services may be expended without regard to the provisions relating to excess costs in section 1414(a) of this title.

NOTICE AND HEARING PRIOR TO DISAPPROVAL OF PLAN

(c)(1) The Secretary shall approve any State plan and any modification thereof which–

(A) is submitted by a State eligible in accordance with section 1412 of this title; and

(B) meets the requirements of subsection (a) and subsection (b) of this section.

(2) The Secretary shall disapprove any State plan which does not meet the requirements of the paragraph (1), but shall not finally disapprove a State plan except after reasonable notice and opportunity for a hearing to the State.

PARTICIPATION OF HANDICAPPED CHILDREN IN PRIVATE SCHOOLS

(d)(1) If, on the date of enactment of the Education of the Handicapped Act Amendments of 1983, a State educational agency is prohibited by law from providing for the participation in special programs of handicapped children enrolled in private elementary and secondary schools as required by subsection (a)(4), the Secretary shall waive such requirement, and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a)(4).

(2)(A) When the Secretary arranges for services pursuant to this subsection, the Secretary, after consultation with the appropriate public and private school officials, shall pay to the provider of such services an amount per child which may not exceed the Federal amount provided per child under this part to all handicapped children enrolled in the State for services for the fiscal year preceding the fiscal year for which the determination is made.

(B) Pending final resolution of any investigation or complaint that could result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State educational agency the amount the Secretary estimates would be necessary to pay the cost of such services.

(C) Any determination by the Secretary under this section shall continue in effect until the Secretary determines that there will no longer be any failure or inability on the part of the State educational agency to meet the requirements of subsection (a)(4).

(3)(A) The Secretary shall not take any final action under this subsection until the State educational agency affected by such action has had an opportunity, for at least 45 days after receiving written notice thereof, to submit written objections and to appear before the Secretary or the Secretary's designee to show cause why such action should not be taken.

(B) If a State educational agency is dissatisfied with the Secretary's final action after a proceeding under subparagraph (A) of this paragraph, it may, within 60 days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based his action, as provided in section 2112 of title 28, United States Code.

(C) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify the Secretary's previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(D) Upon the filing of a petition under subparagraph (B), the court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

PROHIBITION ON REDUCTION OF ASSISTANCE

(e) This Act shall not be construed to permit a State to reduce medical and other assistance available or to alter eligibility under titles V and XIX of the Social Security Act with respect to the provision of a free appropriate public education for handicapped children within the State.

Pub. L. 91-230, Title VI, Sec. 613, Apr. 13, 1970, 83 Stat. 179; amended by Pub. L. 93-380, Title VI, Secs. 614(c), (d), 615(b), (c), Title VIII, Sec. 843(b)(2), Aug. 21, 1974, 88 Stat. 581, 583, 611; Pub. L. 94-142, Secs. 2(b)(3), 5(a), Nov. 29, 1975, 89 Stat. 774, 782; Pub. L. 98-199, Sec. 7, Dec. 2, 1983, 97 Stat. 1359; and by Pub. L. 99-457, Title II, Sec. 203, and Title IV, Sec. 405, Oct. 8, 1986, 100 Stat. 1158 and 1174.

Sec. 1414. Application

REQUISITE FEATURES

(a) A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall–

(1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which–

(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are handicapped, regardless of the severity of their handicap, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

(B) establish policies and procedures in accordance with detailed criteria prescribed under section 1417(c) of this title;

(C) establish a goal of providing full educational opportunities to all handicapped children, including–

(i) procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under section 1413(a)(3) of this title;

(ii) the provision of, and the establishment of priorities for providing, a free appropriate public education to all handicapped children, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education;

(iii) the participation and consultation of the parents or guardian of such children; and

(iv) to the maximum extent practicable and consistent with the provisions of section 1412(5)(B) of this title, the provision of special services to enable such children to participate in regular educational programs;

(D) establish a detailed timetable for accomplishing the goal described in subclause (C); and

(E) provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal described in subclause (C);

(2) provide satisfactory assurance that (A) the control of funds provided under this part, and title to property derived from such funds, shall be in a public agency for the uses and purposes provided in this part, and that a public agency will administer such funds and property; (B) Federal funds expended by local educational agencies and intermediate educational units for programs under this part (i) shall be used to pay only the excess costs directly attributable to the education of handicapped children, and (ii) shall be used to supplement and, to

the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant such State and local funds; and (C) State and local funds will be used in the jurisdiction of the local educational agency or intermediate educational unit to provide services in program areas that, taken as a whole, are at least comparable to services being provided in areas of such jurisdiction which are not receiving funds under this part;

(3)(A) provide for furnishing such information (which, in the case of reports relating to performance, is in accordance with specific performance criteria related to program objectives) as may be necessary to enable the State educational agency to perform its duties under this part, including information relating to the educational achievement of handicapped children participating in programs carried out under this part; and

(B) keeping such records, and affording such access to such records, as the State educational agency may find necessary to assure the correctness and verification of such information furnished under subparagraph (A);

(4) provide for making the application and all pertinent documents related to such application available to parents, guardians, and other members of the general public, and provide that all evaluations and reports required under clause (3) shall be public information;

(5) provide assurances that the local educational agency or intermediate educational unit will establish or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually;

(6) provide satisfactory assurance that policies and programs established and administered by the local educational agency or intermediate educational unit shall be consistent with the provision of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title; and

(7) provide satisfactory assurance that the local educational agency or intermediate educational unit will establish and maintain procedural safeguards in accordance with the provisions of sections 1412(5)(B), 1412(5)(C), and 1415 of this title.

APPROVAL BY STATE EDUCATIONAL AGENCIES OF APPLICATIONS SUBMITTED BY LOCAL EDUCATIONAL AGENCIES OR INTERMEDIATE EDUCATIONAL UNITS; NOTICE AND HEARING

(b)(1) A State educational agency shall approve any application submitted by a local educational agency or an intermediate educational unit under subsection (a) of this section if the State educational agency determines that such application meets the requirements of subsection (a) of this section, except that no such application may be approved until the State plan submitted by such State educational agency under subsection (a) of this section is approved by the Secretary under section 1413(c) of this title. A State educational agency shall disapprove any application submitted by a local educational agency or an intermediate educational unit under subsection (a) of this section if the State educational agency determines that such application does not meet the requirements of subsection (a) of this section.

(2)(A) Whenever a State educational agency, after reasonable notice and opportunity for a hearing, finds that a local educational agency or an intermediate educational unit, in the administration of an application approved by the State educational agency under paragraph (1), has failed to comply with any requirement set forth in such application, the State educational agency, after giving appropriate notice to the local educational agency or the intermediate educational unit, shall–

(i) make no further payments to such local educational agency or such intermediate educational unit under section 1420 of this title until the State educational agency is satisfied that there is no longer any failure to comply with the requirement involved; or

(ii) take such finding into account in its review of any application made by such local educational agency or such intermediate educational unit under subsection (a) of this section.

(B) The provisions of the last sentence of section 1416(a) of this title shall apply to any local educational agency or any intermediate educational unit receiving any notification from a State educational agency under this paragraph.

(3) In carrying out its functions under paragraph (1), each State educational agency shall consider any decision made pursuant to a hearing held under section 1415 of this title which is adverse to the local educational agency or intermediate educational unit involved in such decision.

CONSOLIDATED APPLICATIONS

(c)(1) A State educational agency may, for purposes of the consideration and approval of applications under this section, require local educational agencies to submit a consolidated application for payments if such State educational agency determines that any individual application submitted by any such local educational agency will be disapproved because such local educational agency is ineligible to receive payments because of the application of section 1411(c)(4)(A)(i) of this title or such local educational agency would be unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of handicapped children.

(2)(A) In any case in which a consolidated application of local educational agencies is approved by a State educational agency under paragraph (1), the payments which such local educational agencies may receive shall be equal to the sum of payments to which each such local educational agency would be entitled under section 1411(d) of this title if an individual application of any such local educational agency has been approved.

(B) The State educational agency shall prescribe rules and regulations with respect to consolidated applications submitted under this subsection which are consistent with the provisions of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title and which provide participating local educational agencies with joint responsibilities for implementing programs receiving payments under this subchapter.

(C) In any case in which an intermediate educational unit is required pursuant to State law to carry out the provisions of this subchapter, the joint responsibilities given to local educational agencies under subparagraph (B) shall not apply to the administration and disbursement of any payments received by such intermediate educational unit. Such responsibilities shall be carried out exclusively by such intermediate educational unit.

SPECIAL EDUCATION AND RELATED SERVICES PROVIDED DIRECTLY BY STATE EDUCATIONAL AGENCIES; REGIONAL OR STATE CENTERS

(d) Whenever a State educational agency determines that a local educational agency–

(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section;

(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

(3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;

the State educational agency shall use the payments which would have been available to such local educational agency to provide special educational and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.

REALLOCATION OF FUNDS

(e) Whenever a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all handicapped children residing in the area served by such agency with State and local funds otherwise available to such agency, the State educational agency may reallocate funds (or such portion of those funds as may not be required to provide such education and services) made available to such agency, pursuant to section 1411(d) of this title, to such other local educational agencies within the State as are not adequately providing special education and related services to all handicapped children residing in the areas served by such other local educational agencies.

PROGRAMS USING STATE OR LOCAL FUNDS

(f) Notwithstanding the provisions of subsection (a)(2)(B)(ii) of this section, any local educational agency which is required to carry out any program for the education of handicapped children pursuant to a State law shall be entitled to receive payments under section 1411(d) of this title for use in carrying out such program, except that such payments may not be used to reduce the level of expenditures for such program made by such local educational agency from State or local funds below the level of such expenditures for the fiscal year prior to the fiscal year for which such local educational agency seeks such payments.

Pub. L. 91-230, Title VI, Sec. 614, Apr. 13, 1970, 84 Stat. 181; amended by Pub. L. 94-142, Sec. 5(a), Nov. 29, 1975, 89 Stat. 784.

Sec. 1415. Procedural safeguards

ESTABLISHMENT AND MAINTENANCE

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

REQUIRED PROCEDURES; HEARING

(b)(1) The procedures required by this section shall include, but shall not be limited to–

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, available, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit–

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

REVIEW OF LOCAL DECISION BY STATE EDUCATIONAL AGENCY

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

ENUMERATION OF RIGHTS ACCORDED PARTIES TO HEARINGS

(d) Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 1417(c) and shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

CIVIL ACTION; JURISDICTION

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4)(A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian if–

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Whenever the court finds that–

(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation; or

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding;

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 1415 of this Act.

(f) Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of handicapped children and youth, except that before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (b)(2) and (c) shall be exhausted to the same extent as would be required had the action been brought under this part.

Pub. L. 91-230, Title VI, Sec. 615, as added Pub. L. 94-142, Sec. 5(a), Nov. 29, 1975, 89 Stat. 788, and amended by Pub. L. 99-372 Secs. 2 and 3, Aug. 5, 1986, 100 Stat. 796.

Sec. 1416. Withholding of payments; judicial review

(a) Whenever the Secretary, after reasonable notice and opportunity for hearing to the State educational agency involved (and to any local educational agency or intermediate educational unit affected by any failure described in clause (2)), finds–

(1) that there has been a failure to comply substantially with any provision of section 1412 or section 1413 of this title, or

(2) that in the administration of the State plan there is a failure to comply with any provision of this subchapter or with any requirements set forth in the application of a local educational agency or intermediate educational unit approved by the State educational agency pursuant to the State plan,

the Secretary (A) shall, after notifying the State educational agency, withhold any further payments to the State under this part, and (B) may, after notifying the State educational agency, withhold further payments to the State under the Federal programs specified in section 1413(a)(2) within the Secretary's jurisdiction, to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children. If the Secretary withholds further payments under clause (A) or clause (B) the Secretary may determine that such withholding will be limited to programs or projects under the State plan, or portions thereof, affected by the failure, or that the State educational agency shall not make further payments under this subchapter to specified local educational agencies or intermediate educational units affected by the failure. Until the Secretary is satisfied that there is no longer any failure to comply with the provisions of this subchapter, as specified in clause (1) or clause (2), no further payments shall be made to the State under this subchapter or under the Federal programs specified in section 1413(a)(2) of this title within the Secretary's jurisdiction to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children, or payments by the State educational agency under this subchapter shall be limited to local educational agencies and intermediate educational units whose actions did not cause or were not involved in the failure, as the case may be. Any State educational agency, local educational agency, or intermediate educational unit in receipt of a notice pursuant to the first sentence of this subsection shall, by means of a public notice, take such measures as may be necessary to bring the pendency of an action pursuant to this subsection to the attention of the public within the jurisdiction of such agency or unit.

(b)(1) If any State is dissatisfied with the Secretary's final action with respect to its State plan submitted under section 1413 of this title, such State may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings upon which the Secretary's action was based, as provided in section 2112 of title 28.

(2) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify the previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(3) Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

Pub. L. 91-230 Title VI, Sec. 616, as added Pub. L. 94-142, Sec. 5(a), Nov. 29, 1975, 89 Stat. 789.

Sec. 1417. Administration

DUTIES OF SECRETARY

(a)(1) In carrying out the Secretary's duties under this subchapter, the Secretary shall–

(A) cooperate with, and furnish all technical assistance necessary, directly or by grant or contract, to the States in matters relating to the education of handicapped children and the execution of the provisions of this subchapter;

(B) provide such short-term training programs and institutes as are necessary;

(C) disseminate information, and otherwise promote the education of all handicapped children within the States; and

(D) assure that each State shall, within one year after November 29, 1975, and every year thereafter, provide certification of the actual number of handicapped children receiving special education and related services in such State.

(2) As soon as practicable after November 29, 1975, the Secretary shall, by regulation, prescribe a uniform financial report to be utilized by State educational agencies in submitting State plans under this subchapter in order to assure equity among the States.

RULES AND REGULATIONS

(b) In carrying out the provisions of this subchapter, the Secretary (and the Secretary, in carrying out the provision of subsection (c) of this section)* shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations as may be necessary. No other less formal method of implementing such provisions is authorized.

So in original; probably should read: "In carrying out the provisions of this subchapter and of subsection (c) of this section, the Secretary shall issue,..."

PROTECTION OF RIGHTS AND PRIVACY OF PARENTS AND STUDENTS

(c) The Secretary shall take appropriate action, in accordance with the provisions of section 1232g of this title, to assure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary and by State and local educational agencies pursuant to the provisions of this subchapter.

HIRING OF QUALIFIED PERSONNEL

(d) The Secretary is authorized to hire qualified personnel necessary to conduct data collection and evaluation activities required by subsections (b), (c) and (d) of section 1418 of this title and to carry out the Secretary's duties under subsection (a)(1) of this section without regard to the provisions of title 5 relating to appointments in the competitive service and without regard to chapter 51 and subchapter 111 of chapter 53 of such title relating to classification and general schedule pay rates except that no more than twenty such personnel shall be employed at any time.

Pub. L. 91-230, Title VI, Sec 617, as added Pub. L. 94-142, Sec. 5(a), Nov. 29, 1975, 89 Stat. 791.

Sec. 1418. Evaluation

(a) The Secretary shall, directly or by grant, contract, or cooperative agreement, collect data and conduct studies, investigations, and evaluations–

(1) to assess progress in the implementation of this Act;

(2) to assess the impact, and effectiveness of State and local efforts and efforts by the Secretary of the Interior to provide (A) free appropriate public education to handicapped children and youth and (B) early intervention services to handicapped infants and toddlers, and

(3) to provide–

(A) Congress with information relevant to policymaking, and

(B) State, local, and Federal agencies including the Department of Interior with information relevant to program management, administration, and effectiveness with respect to such education and early intervention services.

(b) In carrying out subsection (a), the Secretary, on at least an annual basis, shall obtain data concerning programs and projects assisted under this Act and under other Federal laws relating to handicapped infants, toddlers, children, and youth, and such additional information, from State and local educational agencies, the Secretary of Interior, and other appropriate sources, as is necessary for the implementation of this Act including–

(1) the number of handicapped infants, toddlers, children and youth in each State receiving a free appropriate public education or early intervention services–(A) in age groups 0-2 and 3-5, and (B) in age groups 6-11, 12-17, and 18-21 by disability category,

(2) the number of handicapped children and youth in each State who are participating in regular educational programs (consistent with the requirements of sections 1412(5)(B) and 1414(a)(1)(C)(iv)) by disability category, and the number of handicapped children and youth in separate classes, separate schools or facilities, or public or private residential facilities, or who have been otherwise removed from the regular education environment,

(3) the number of handicapped children and youth exiting the educational system each year through program completion or otherwise–(A) in age group 3-5, and (B) in age groups 6-11, 12-17, and 18-21 by disability category and anticipated services for the next year,

(4) the amount of Federal, State, and local funds expended in each State specifically for special education and related services and for early intervention services (which may be based upon a sampling of data from State agencies including State and local educational agencies),

(5) the number and type of personnel that are employed in the provision of special education and related services to handicapped children and youth and early intervention services to handicapped infants and toddlers by disability category served, and the estimated number and type of additional personnel by disability category needed to adequately carry out the policy established by this Act, and

(6) a description of the special education and related services and early intervention services needed to fully implement this Act throughout each State, including estimates of the number of handicapped infants and toddlers in the 0-2 age group and estimates of the number of handicapped children and youth–(A) in age group 3-5 and (B) in age groups 6-11, 12-17, and 18-21 and by disability category.

(c) The Secretary shall, by grant, contract, or cooperative agreement, provide for evaluation studies to determine the impact of this Act. Each such evaluation shall include recommendations for improvement of the programs under this Act. The Secretary shall, not later than July 1 of each year, submit to the appropriate committees of each House of the Congress and publish in the Federal Register proposed evaluation priorities for review and comment.

(d)(1) The Secretary may enter into cooperative agreements with State educational agencies and other State agencies to carry out studies to assess the impact and effectiveness of programs assisted under this Act.

(2) An agreement under paragraph (1) shall–

(A) provide for the payment of not to exceed 60 percent of the total cost of studies conducted by a participating State agency to assess the impact and effectiveness of programs assisted under this Act, and

(B) be developed in consultation with the State Advisory Panel established under this Act, the local educational agencies, and others involved in or concerned with the education of handicapped children and youth and the provision of early intervention services to handicapped infants and toddlers.

(3) The Secretary shall provide technical assistance to participating State agencies in the implementation of the study design, analysis, and reporting procedures.

(4) In addition, the Secretary shall disseminate information from such studies to State agencies, regional resources centers, and clearinghouses established by this Act, and, as appropriate, to others involved in, or concerned with, the education of handicapped children and youth and the provision of early intervention services to handicapped infants and toddlers.

(e)(1) At least one study shall be a longitudinal study of a sample of handicapped students, encompassing the full range of handicapping conditions, examining their educational progress while in special education and their occupational, educational, and independent living status after graduating from secondary school or otherwise leaving special education.

(2) At least one study shall focus on obtaining and compiling current information available, through State educational agencies and local educational agencies and other service providers, regarding State and local expenditures for educational services for handicapped students (including special education and related services) and shall gather information needed in order to calculate a range of per pupil expenditures by handicapping condition.

(f)(1) Not later than 120 days after the close of each fiscal year, the Secretary shall publish and disseminate an annual report on the progress being made toward the provision of a free appropriate public education to all handicapped children and youth and early intervention services for handicapped infants and toddlers. The annual report shall be transmitted to the appropriate committees of each House of Congress and published and disseminated in sufficient quantities to the education community at large and to other interested parties.

(2) The Secretary shall include in each annual report under paragraph (1)–

(A) a compilation and analysis of data gathered under subsection (b),

(B) an index and summary of each evaluation activity and results of studies conducted under subsection (c),

(C) a description of findings and determinations resulting from monitoring reviews of state implementation of part B of this Act,

(D) an analysis and evaluation of the participation of handicapped children and youth in vocational education programs and services,

(E) an analysis and evaluation of the effectiveness of procedures undertaken by each State educational agency, local educational agency, and intermediate educational unit to ensure that handicapped children and youth receive special education and related services in the least restrictive environment commensurate with their needs and to improve programs of instruction for handicapped children and youth in day or residential facilities, and

(F) any recommendation for change in the provisions of this Act or any other Federal law providing support for the education of handicapped children and youth.

(3) In the annual report under paragraph (1) for fiscal year 1985 which is published in 1986 and for every third year thereafter, the Secretary shall include in the annual report–

(A) an index of all current projects funded under parts C through G of this title, and

(B) data reported under sections 1421, 1422, 1423, 1427, 1434, 1441, and 1461.

(4) In the annual report under paragraph (1) for fiscal year 1988 which is published in 1989, the Secretary shall include special sections addressing the provision of a free appropriate public education to–(A) handicapped infants, toddlers, children and youth in rural areas, (B) handicapped migrants, (C) handicapped Indians (particularly programs operated under section 1411(f)), (D) handicapped Native Hawaiian, and other native Pacific basin children and youth, and (E) handicapped infants, toddlers, children and youth with limited English proficiency.

(5) Beginning in 1986, in consultation with the National Council on Disability and the Bureau of Indian Affairs Advisory Committee for Exceptional Children, the Secretary shall include a description of the status of early intervention services for handicapped infants and toddlers from birth through age two, inclusive, and special education and related services to handicapped children from 3 through 5 years of age (including those receiving services through Head

Start, Developmental Disabilities Programs, Crippled Children's Services, Mental Health/Mental Retardation Agency, and State child-development centers and private agencies under contract with local schools).

(g) There are authorized to be appropriated $3,800,000 for fiscal year 1987, $4,000,000 for fiscal year 1988, and $4,200,000 for fiscal year 1989 to carry out this section.

Pub. L. 91-230, Title VI, Sec. 618, as added by Pub. L. 94-142, Sec. 5(a), Nov. 29, 1985, 89 Stat. 791, and amended by Pub. L. 98-199, Sec. 8, Dec. 2, 1983, 97 Stat. 1360, and by Pub. L. 99-457, Title IV, Sec. 406, Oct. 8, 1986, 100 Stat. 1174.

Sec. 1419. Preschool grants

(a)(1) For fiscal years 1987 through 1989 (or fiscal year 1990 if the Secretary makes a grant under this paragraph for such fiscal year) the Secretary shall make a grant to any State which–

(A) has met the eligibility requirements of section 1412,

(B) has a State plan approved under section 1413, and

(C) provides special education and related services to handicapped children aged three to five, inclusive.

(2)(A) For fiscal year 1987 the amount of a grant to a State under paragraph (1) may not exceed–

(i) $300 per handicapped child aged three to five, inclusive, who received special education and related services in such State as determined under section 1411(a)(3), or

(ii) if the amount appropriated under subsection (e) exceeds the product of $300 and the total number of handicapped children aged three to five, inclusive, who received special education and related services as determined under section 1411(a)(3)–

(I) $300 per handicapped child aged three to five, inclusive, who received special education and related services in such State as determined under section 1411(a)(3), plus

(II) an amount equal to the portion of the appropriation available after allocating funds to all States under subclause (I) (the excess appropriation) divided by the estimated increase, from the preceding fiscal year, in the number of handicapped children aged three to five, inclusive, who will be receiving special education and related services in all States multiplied by the estimated increase in the number of such children in such State.

(B) For fiscal year 1988, funds shall be distributed in accordance with clause (i) or (ii) of paragraph (2)(A), except that the amount specified therein shall be $400 instead of $300.

(C) For fiscal year 1989, funds shall be distributed in accordance with clause (i) or (ii) of paragraph (2)(A), except that the amount specified therein shall be $500 instead of $300.

(D) If the Secretary makes a grant under paragraph (1) for fiscal year 1990, the amount of a grant to a State under such paragraph may not exceed

$1,000 per handicapped child aged three to five, inclusive, who received special education and related services in such State as determined under section 1411(a)(3).

(E) If the actual number of additional children served in a fiscal year differs from the estimate made under subparagraph (A)(ii)(II), the Secretary shall adjust (upwards or downwards) a State's allotment in the subsequent fiscal year.

(F)(i) The amount of a grant under subparagraph (A), (B), or (C) to any State for a fiscal year may not exceed $3,800 per estimated handicapped child aged three to five, inclusive, who will be receiving or handicapped child, age three to five, inclusive, who is receiving special education and related services in such State.

(ii) If the amount appropriated under subsection (e) for any fiscal year exceeds the amount of grants which may be made to the States for such fiscal year, the excess amount appropriated shall remain available for obligation under this section for 2 succeeding fiscal years.

(3) To receive a grant under paragraph (1) a State shall make an application to the Secretary at such time, in such manner, and containing or accompanied by such information as the Secretary may reasonably require.

(b)(1) For fiscal year 1990 (or fiscal year 1991 if required by paragraph (2)) and fiscal years thereafter the Secretary shall make a grant to any State which–

(A) has met the eligibility requirements of section 1412, and

(B) has a State plan approved under section 1413 which includes policies and procedures that assure the availability under the State law and practice of such State of a free appropriate public education for all handicapped children aged three to five, inclusive.

(2) The Secretary may make a grant under paragraph (1) only for fiscal year 1990 and fiscal years thereafter, except that if–

(A) the aggregate amount that was appropriated under subsection (e) for fiscal years 1987, 1988, and 1989 was less than $656,000,000, and

(B) the amount appropriated for fiscal year 1990 under subsection (e) is less than $306,000,000,

the Secretary may not make a grant under paragraph (1) until fiscal year 1991 and shall make a grant under subsection (a)(1) for fiscal year 1990.

(3) The amount of any grant to any State under paragraph (1) for any fiscal year may not exceed $1,000 for each handicapped child in such State aged three to five, inclusive.

(4) To receive a grant under paragraph (1) a State shall make an application to the Secretary at such time, in such manner, and containing or accompanied by such information as the Secretary may reasonably require.

(c)(1) For fiscal year 1987, a State which receives a grant under subsection (a)(1) shall–

(A) distribute at least 70 percent of such grant to local educational agencies and intermediate educational units in such State in accordance with paragraph (3), except that in applying such section only handicapped children aged three to five, inclusive, shall be considered,

(B) use not more than 25 percent of such grant for the planning and development of a comprehensive delivery system for which a grant could have been made under section 1423(b) in effect through fiscal year 1987 and for direct and support services for handicapped children, and

(C) use not more than 5 percent of such grant for administrative expenses related to the grant.

(2) For fiscal years beginning after fiscal year 1987, a State which receives a grant under subsection (a)(1) or (b)(l) shall–

(A) distribute at least 75 percent of such grant to local educational agencies and intermediate educational units in such State in accordance with paragraph (3), except that in applying such section only handicapped children aged three to five, inclusive, shall be considered,

(B) use not more than 20 percent of such grant for the planning and development of a comprehensive delivery system for which a grant could have been made under section 1423(b) in effect through fiscal year 1987 and for direct and support services for handicapped children, and

(C) use not more than 5 percent of such grant for administrative expenses related to the grant.

(3) From the amount of funds available to local educational agencies and intermediate educational units in any State under this section, each local educational agency or intermediate educational unit shall be entitled to–

(A) an amount which bears the same ratio to the amount of such funds or subsection (a)(2)(A)(ii)(I), as the case may be, as the number of handicapped children aged three to five, inclusive, who received special education and related services as determined under section 1411(a)(3) in such local educational agency or intermediate educational unit bears to the aggregate number of handicapped children aged three to five, inclusive, who received special education and related services in all local educational agencies and intermediate educational units in the State entitled to funds under this section, and

(B) to the extent funds are available under subsection (a)(2)(A)(ii)(II), an amount which bears the same ratio to the amount available under subsection (a)(2)(A)(ii)(II) as the estimated number of additional handicapped children aged three to five, inclusive, who will be receiving special education and related services in such local educational agency or intermediate educational unit bears to the aggregate number of such children in all local educational agencies and intermediate educational units in the State entitled to funds under this section.

(d) If the sums appropriated under subsection (e) for any fiscal year for making payments to States under subsection (a)(1) or (b)(1) are not sufficient to pay in full the maximum amounts which all States may receive under such subsection for such fiscal year, the maximum amounts which all States may receive under such subsection for such fiscal year shall be ratably reduced by first ratably reducing amounts computed under the excess appropriation provision of subsection (a)(2)(A)(ii)(II). If additional funds become available for making such payments for any fiscal year during which the preceding sentence is applicable, the reduced maximum amounts shall be increased on the same basis as they were reduced.

(e) For grants under subsections (a)(1) and (b)(1) there are authorized to be appropriated such sums as may be necessary.

(f) Notwithstanding any other provision of law, unless enacted in express limitation of this subsection, amounts appropriated under this section for fiscal years 1987 and 1988 and received by a State whose allotment for the succeeding fiscal year is adjusted downwards under subsection (a)(2)(E) shall remain available for obligation by such State, and by local educational agencies and intermediate educational units in such State during the 2 fiscal years succeeding the fiscal year for which such amounts were appropriated.

Pub. L. 91-230, Title VI, Sec. 619, as added Pub. L. 94-142, Sec. 5(a), Nov. 29, 1975, 89 Stat. 793, and amended by Pub. L. 98-199, Sec. 9, Dec. 2, 1983, 97 Stat. 1363, and by Pub. L. 99-457, Title II, Sec. 201, Oct. 8, 1986, 100 Stat. 1155.

Sec. 1420. Payments

(a) The Secretary shall make payments to each State in amounts which the State educational agency of such State is eligible to receive under this subchapter. Any State educational agency receiving payments under this subsection shall distribute payments to the local educational agencies and intermediate educational units of such State in amounts which such agencies and units are eligible to receive under this subchapter after the State educational agency has approved applications of such agencies or units for payments in accordance with section 1414(b) of this title.

(b) Payments under this subchapter may be made in advance or by way of reimbursement and in such installments as the Secretary may determine necessary.

Pub. L. 91-230, Title VI, Sec. 620, as added Pub. L. 94-142, Sec. 5(a), Nov. 29, 1975, 89 Stat. 793.

Part C–Centers And Services To Meet Special Needs Of Handicapped Individuals

Sec. 1421. Regional resource and federal centers

(a) The Secretary may make grants to, or enter into contracts or cooperative agreements with, institutions of higher education, public agencies, private nonprofit organizations, State educational agencies, or combinations of such agencies or institutions (which combinations may include one or more local educational agencies) within particular regions of the United States, to pay all or part of the cost of the establishment and operation of regional resource centers. Each regional resource center shall provide consultation, technical assistance, and training to State educational agencies and through such State educational agencies to local educational agencies and to other appropriate public agencies providing early intervention services. The services provided by a regional resource center shall be consistent with the priority needs identified by the States served by the center and the findings of the Secretary in monitoring reports prepared by the Secretary under section 1417 of the Act. Each regional resource center established or operated under this section shall–

(1) assist in identifying and solving persistent problems in providing quality special education and related services for handicapped children and youth and early intervention services to handicapped infants and toddlers and their families,

(2) assist in developing, identifying, and replicating successful programs and practices which will improve special education and related services to handicapped children and youth and their families and early intervention services to handicapped infants and toddlers and their families,

(3) gather and disseminate information to all State educational agencies within the region and coordinate activities with other centers assisted under this subsection and other relevant projects conducted by the Department of Education,

(4) assist in the improvement of information dissemination to and training activities for professionals and parents of handicapped infants, toddlers, children, and youth, and

(5) provide information to and training for agencies, institutions, and organizations, regarding techniques and approaches for submitting applications for grants, contracts, and cooperative agreements under this subchapter and subchapters D through G.

(b) In determining whether to approve an application for a project under subsection (a), the Secretary shall consider the need for such a center in the region to be served by the applicant and the capability of the applicant to fulfill the responsibilities under subsection (a).

(c) Each regional resource center shall report a summary of materials produced or developed and the summaries reported shall be included in the annual report to Congress required under section 1418.

(d) The Secretary may establish one coordinating technical assistance center focusing on national priorities established by the Secretary to assist the regional resource centers in the delivery of technical assistance, consistent with such national priorities.

(e) Before using funds made available in any fiscal year to carry out this section for purposes of subsection (d), not less than the amount made available in the previous fiscal year for regional resource centers under subsection (a) shall be made available for such centers and in no case shall more than $500,000 be made available for the center under subsection (d).

Pub. L. 91-230, Title VI, Sec. 621, Apr. 13, 1970, 84 Stat. 181; amended by Pub. L. 98-199, Secs. 621, Dec. 2, 1983, 97 Stat. 1357, Pub. L. 98-199, Sec. 10, Dec. 2, 1983, 97 Stat. 1363, and by Pub. L. 99-457, Title III, Sec. 301, Oct. 8, 1986, 100 Stat. 1159.

Sec. 1422. Services for deaf-blind children and youth

(a)(1) The Secretary is authorized to make grants to, or to enter into cooperative agreements or contracts with, public or nonprofit private agencies, institutions, or organizations to assist State educational agencies to–

(A) assure deaf-blind children and youth provision of special education and related services as well as vocational and transitional services; and

(B) make available to deaf-blind youth, upon attaining the age of twenty-two, programs and services to facilitate their transition from educational to other services.

(2) A grant, cooperative agreement, or contract pursuant to paragraph (1)(A) may be made only for programs providing (A) technical assistance to agencies, institutions, or organizations providing educational services to deaf-blind children or youth; (B) pre-service or in-service training to paraprofessionals, professionals, or related services personnel preparing to serve, or serving, deaf-blind children or youth; (C) implication of successful innovative approaches to providing educational or related services to deaf-blind children and youth; and (D) facilitation of parental involvement in the education of their deaf-blind children and youth. Such programs may include–

(i) the diagnosis and educational evaluation of children and youth at risk of being certified deaf-blind;

(ii) programs of adjustment, education, and orientation for deaf-blind children and youth; and

(iii) consultative, counseling, and training services for the families of deaf-blind children and youth.

(3) A grant, cooperative agreement, or contract pursuant to paragraph (1)(B) may be made only for programs providing (A) technical assistance to agencies, institutions, and organizations serving, or proposing to serve, deaf-blind individuals who have attained age twenty-two years; (B) training or in-service training to paraprofessionals or professionals serving, or preparing to serve, such individuals; and (C) assistance in the development or replication of successful innovative approaches to providing rehabilitative, semisupervised, or independent living programs.

(4) In carrying out this subsection, the Secretary shall take into consideration the need for a center for deaf-blind children and youth in light of the general availability and quality of existing services for such children and youth in the part of the country involved.

(b) The Secretary is also authorized to enter into a limited number of cooperative agreements or contracts to establish and support regional programs for the provision of technical assistance in the education of deaf-blind children and youth.

(c)(1) Programs supported under this section shall report annually to the Secretary on (A) the numbers of deaf- blind children and youth served by age, severity, and nature of deaf-blindness; (B) the number of paraprofessionals,

professionals, and family members directly served by each activity; and (C) the types of services provided.

(2) The Secretary shall examine the number of deaf- blind children and youth (A) reported under subparagraph (c)(1)(A) and by the States; (B) served by the programs under part B of this Act and subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965; and (C) the Deaf-Blind Registry of each State. The Secretary shall revise the count of deaf-blind children and youth to reflect the most accurate count.

(3) The Secretary shall summarize these data for submission in the annual report required under section 1418.

(d) The Secretary shall disseminate materials and information concerning effective practices in working with deaf-blind children and youth.

(e) The Secretary is authorized to make grants to, or enter into contracts or cooperative agreements with, public or nonprofit private agencies, institutions, or organizations for the development and operation of extended school year demonstration programs for severely handicapped children and youth, including deaf-blind children and youth.

(f) The Secretary may make grants to, or enter into contracts or cooperative agreements with, the entities under section 1424(a) for the purposes in such section.

Pub. L. 91-230, Title VI, Sec. 622, Apr. 13, 1970, 84 Stat. 182; amended by Pub. L. 98-199, Sec. 10, Dec. 2, 1983, 97 Stat. 1364, and by Pub. L. 99-457, Title III, Sec. 302, Oct. 8, 1986, 100 Stat. 1160.

Sec. 1423. Early education for handicapped children

(a)(1) The Secretary may arrange by contract, grant, or cooperative agreement with appropriate public agencies and private nonprofit organizations, for the development and operation of experimental, demonstration, and outreach preschool and early intervention programs for handicapped children which the Secretary determines show promise of promoting a comprehensive and strengthened approach to the special problems of such children. Such programs shall include activities and services designed to–

(A) facilitate the intellectual, emotional, physical, mental, social, speech, language development, and self-help skills of such children,

(B) encourage the participation of the parents of such children in the development and operation of any such program,

(C) acquaint the community to be served by any such program with the problems and potentialities of such children,

(D) offer training about exemplary models and practices to State and local personnel who provide services to handicapped children from birth through 8, and

(E) support the adoption of exemplary models and practices in States and local communities.

(2) Programs authorized by paragraph (1) shall be coordinated with similar programs in the schools operated or supported by State or local educational agencies of the community to be served and with similar programs operated by other public agencies in such community.

(3) As much as is feasible, programs assisted under paragraph (1) shall be geographically dispersed throughout the Nation in urban as well as rural areas.

(4)(A) Except as provided in subparagraph (B), no arrangement under paragraph (1) shall provide for the payment of more than 90 percent of the total annual costs of development, operation, and evaluation of any program. Non-Federal contributions may be in cash or in kind, fairly evaluated, including plant, equipment, and services.

(B) The Secretary may waive the requirement of subparagraph (A) in the case of an arrangement entered into under paragraph (1) with governing bodies of Indian tribes located on Federal or State reservations and with consortia of such bodies.

(b) The Secretary shall arrange by contract, grant, or cooperative agreement with appropriate public agencies and private nonprofit organizations for the establishment of a technical assistance development system to assist entities operating experimental, demonstration, and outreach programs and to assist State agencies to expand and improve services provided to handicapped children.

(c) The Secretary shall arrange by contract, grant, or cooperative agreement with appropriate public agencies and private nonprofit organizations for the establishment of early childhood research institutes to carry on sustained research to generate and disseminate new information on preschool and early intervention for handicapped children and their families.

(d) The Secretary may make grants to, or enter into contracts or cooperative agreements under this section with, such organizations or institutions, as are determined by the Secretary to be appropriate, for research to identify and meet the full range of special needs of handicapped children and for training of personnel for programs specifically designed for handicapped children.

(e) At least one year before the termination of a grant, contract, or cooperative agreement made or entered into under subsections (b) and (c), the Secretary shall publish in the Federal Register a notice of intent to accept applications for such a grant, contract, or cooperative agreement contingent on the appropriation of sufficient funds by Congress.

(f) For purposes of this section the term "handicapped children" includes children from birth through eight years of age.

Pub. L. 91-230, Title VI, Sec. 623, Apr. 13, 1970, 84 Stat. 183; amended by Pub. L. 98-199, Sec. 10, Dec. 2, 1983, 97 Stat. 1365, and by Pub. L. 99-457, Title III, Sec. 303, Oct. 8, 1986, 100 Stat. 1161.

Sec. 1424. Programs for severely handicapped children

(a) The Secretary may make grants to, or enter into contracts or cooperative agreements with, such organizations or institutions, as are determined by the Secretary to be appropriate, to address the needs of severely handicapped children and youth, for–

(1) research to identify and meet the full range of special needs of such handicapped children and youth,

(2) the development or demonstration of new, or improvements in existing methods, approaches, or techniques which would contribute to the adjustment and education of such handicapped children and youth,

(3) training of personnel for programs specifically designed for such children and youth, and

(4) dissemination of materials and information about practices found effective in working with such children and youth.

(b) In making grants and entering into contracts and cooperative agreements under subsection (a), the Secretary shall ensure that the activities funded under such grants, contracts, or cooperative agreements will be coordinated with similar activities funded from grants and contracts under other sections of this Act.

(c) To the extent feasible, programs authorized by subsection (a) shall be geographically dispersed throughout the Nation in urban and rural areas.

Pub. L. 91-230, Title VI, Sec. 624, Apr. 13, 1970, 84 Stat. 183; amended by Pub. L. 98-199, Sec. 10, Dec. 2, 1983, 97 Stat. 1366, and by Pub. L. 99-457, Title III, Sec. 304, Oct. 8, 1986, 100 Stat. 1162.

Sec. 1424a. Postsecondary education

(a)(1) The Secretary may make grants to, or enter into contracts with, State educational agencies, institutions of higher education, junior and community colleges, vocational and technical institutions, and other appropriate nonprofit educational agencies for the development, operation, and dissemination of specially designed model programs of postsecondary, vocational, technical, continuing, or adult education for handicapped individuals.

(2) In making grants or contracts on a competitive basis under paragraph (1), the Secretary shall give priority consideration to 4 regional centers for the deaf and to model programs for individuals with handicapping conditions other than deafness–

(A) for developing and adapting programs of postsecondary, vocational, technical, continuing, or adult education to meet the special needs of handicapped individuals, and

(B) for programs that coordinate, facilitate, and encourage education of handicapped individuals with their nonhandicapped peers.

(3) Persons operating programs for handicapped persons under a grant or contract under paragraph (1) must coordinate their efforts with and disseminate information about their activities to the clearinghouse on postsecondary programs established under section 1433(b).

(4) At least one year before the termination of a grant or contract with any of the 4 regional centers for the deaf, the Secretary shall publish in the Federal Register a notice of intent to accept applications for such grant or contract, contingent on the appropriation of sufficient funds by Congress.

(5) To the extent feasible, programs authorized by paragraph (1) shall be geographically dispersed throughout the Nation in urban and rural areas.

(6) Of the sums made available for programs under paragraph (1), not less than $2,000,000 shall first be available for the 4 regional centers for the deaf.

(b) For the purposes of subsection (a) the term "handicapped individuals" means individuals who are mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired individuals, or individuals with specific learning disabilities who by reason thereof require special education and related services.

Pub. L. 91-230, Title VI, Sec. 625, as added Pub. L. 93-380, Title VI, Sec. 616, Aug. 21, 1974, 88 Stat. 584; amended by Pub. L. 98-199, Sec. 10, Dec. 2, 1983, 97 Stat. 1367, and by Pub. L. 99-457 Title III, Sec. 305, Oct. 8, 1986, 100 Stat. 1162.

Sec. 1425. Secondary education and transitional services for handicapped youth

(a) The Secretary may make grants to, or enter into contracts with, institutions of higher education, State educational agencies, local educational agencies, or other appropriate public and private nonprofit institutions or agencies (including the State job training coordinating councils and service delivery area administrative entities established under the Job Training Partnership Act) to–

(1) strengthen and coordinate special education and related services for handicapped youth currently in school or who recently left school to assist them in the transition to postsecondary education, vocational training, competitive employment (including supported employment), continuing education, or adult services,

(2) stimulate the improvement and development of programs for secondary special education, and

(3) stimulate the improvement of the vocational and life skills of handicapped students to enable them to be better prepared for transition to adult life and services.

To the extent feasible, such programs shall be geographically dispersed throughout the Nation in urban and rural areas.

(b) Projects assisted under subsection (a) may include–

(1) developing strategies and techniques for transition to independent living, vocational training, vocational rehabilitation, postsecondary education, and

competitive employment (including supported employment) for handicapped youth,

(2) establishing demonstration models for services, programs, and individualized education programs, which emphasize vocational training, transitional services, and placement for handicapped youth,

(3) conducting demographic studies which provide information on the numbers, age levels, types of handicapping conditions, and services required for handicapped youth in need of transitional programs,

(4) specially designed vocational programs to increase the potential for competitive employment for handicapped youth,

(5) research and development projects for exemplary service delivery models and the replication and dissemination of successful models,

(6) initiating cooperative models among educational agencies and adult service agencies, including vocational rehabilitation, mental health, mental retardation, and public employment, and employers, which facilitate the planning and developing of transitional services for handicapped youth to postsecondary education, vocational training, employment, continuing education, and adult services,

(7) developing appropriate procedures for evaluating vocational training, placement, and transitional services for handicapped youth,

(8) conducting studies which provide information on the numbers, age levels, types of handicapping conditions and reasons why handicapped youth drop out of school, and

(9) developing special education curriculum and instructional techniques that will improve handicapped students' acquisition of the skills necessary for transition to adult life and services, and

(10) specially designed physical education and therapeutic recreation programs to increase the potential of handicapped youths for community participation.

(c) For purposes of paragraphs (1) and (2) of subsection (b), if an applicant is not an educational agency, such applicant shall coordinate its activities with the State educational agency.

(d) Applications for assistance under subsection (a) other than for the purpose of conducting studies or evaluations shall–

(1) describe the procedures to be used for disseminating relevant findings and data to regional resource centers, clearinghouses, and other interested persons, agencies, or organizations,

(2) describe the procedures that will be used for coordinating services among agencies for which handicapped youth are or will be eligible, and

(3) to the extent appropriate, provide for the direct participation of handicapped students and the parents of handicapped students in the planning, development, and implementation of such projects.

(e) The Secretary is authorized to make grants to, or to enter into contracts or cooperative agreements with, such organizations or institutions as are determined by the Secretary to be appropriate for the development or demonstration of new or improvements in existing methods, approaches, or techniques which will contribute to the adjustment and education of handicapped children and youth and the dissemination of materials and information concerning practices found effective in working with such children and youth.

(f) The Secretary, as appropriate, shall coordinate programs described under subsection (a) with projects developed under section 311 of the Rehabilitation Act of 1973.

Amended by Pub. L. 98-199, Sec. 10, Dec. 2, 1983, 97 Stat. 1367, and by Pub. L. 99-457, Title II, Sec. 306, Oct. 8, 1986, 100 Stat. 1163.

Sec. 1426. Program evaluations

The Secretary shall conduct, either directly or by contract, a thorough and continuing evaluation of the effectiveness of each program assisted under this part. Results of the evaluations shall be analyzed and submitted to the appropriate committees of each House of Congress together with the annual report under section 1418.

Pub. L. 91-230, Title VI, Sec. 626, formerly Sec. 625, Apr. 13, 1970, Stat. 183, renumbered Pub. L. 93-380, Title VI, Sec. 616, Aug. 21, 1974, 88 Stat. 584, amended by Pub. L. 98-199, Sec. 10, Dec. 2, 1983, 97 Stat. 1368.

Sec. 1427. Authorization of appropriations

(a) There are authorized to be appropriated to carry out section 1421, $6,700,000 for fiscal year 1987, $7,100,000 for fiscal year 1988, and $7,500,000 for fiscal year 1989.

(b) There are authorized to be appropriated to carry out section 1422, $15,900,000 for fiscal year 1987, $16,800,000 for fiscal year 1988, and $17,800,000 for fiscal year 1989.

(c) There are authorized to be appropriated to carry out section 1423, $24,470,000 for fiscal year 1987, $25,870,000 for fiscal year 1988, and $27,410,000 for fiscal year 1989.

(d) There are authorized to be appropriated to carry out section 1424, $5,300,000 for fiscal year 1987, $5,600,000 for fiscal year 1988, and $5,900,000 for fiscal year 1989.

(e) There are authorized to be appropriated to carry section 1424a, $5,900,000 for fiscal year 1987, $6,200,000 for fiscal year 1988, and $6,600,000 for fiscal year 1989.

(f) There are authorized to be appropriated to carry out section 1425, $7,300,000 for fiscal year 1987, $7,700,000 for fiscal year 1988, and $8,100,000 for fiscal year 1989.

Pub. L. 91-230, Title VI, Sec. 627, formerly Sec. 626, Apr. 13, 1970, 84 Stat. 184, renumbered and amended Pub. L. 93-380, Title VI, Secs. 616, 617, Aug. 21, 1974, 88 Stat. 584; amended by Pub. L. 95-49, Sec. 2, June 17, 1977, 91 Stat. 230, Pub. L. 98-199, Sec. 10, Dec. 2, 1983, 97 Stat. 1368, and by Pub. L. 99-457, Title III, Sec. 307, Oct. 8, 1986, 100 Stat. 1165.

Part D–Training Personnel For The Education Of Handicapped Individuals

Sec. 1431. Grants for personnel training

(a)(1) The Secretary may make grants, which may include scholarships with necessary stipends and allowances, to institutions of higher education (including university affiliated programs and satellite centers participating in programs under part D of the Developmental Disabilities Assistance and Bill of Rights Act) and other appropriate nonprofit agencies to assist them in training personnel for careers in special education and early intervention, including–

(A) special education teaching, including speech-language pathology and audiology, and adaptive physical education,

(B) related services to handicapped children and youth in educational settings,

(C) special education supervision and administration,

(D) special education research, and

(E) training of special education personnel and other personnel providing special services and pre-school and early intervention services for handicapped children.

(2)(A) The Secretary shall base the award of grants under paragraph (1) the Secretary shall base the determination of such grants on information relating to the present and projected need for the personnel to be trained based on identified State, regional, or National shortages, and the capacity of the institution or agency to train qualified personnel, and other information considered appropriate by the Secretary.

(B) The Secretary shall ensure that grants are only made under paragraph (1) to applicant agencies and institutions that meet State and professionally recognized standards for the preparation of special education and related services personnel unless the grant is for the purpose of assisting the applicant agency or institution to meet such standards.

(3) Grants under paragraph (1) may be used by institutions to assist in covering the cost of courses of training or study for such personnel and for establishing and maintaining fellowships or traineeships with such stipends and allowances as may be determined by the Secretary.

(4) The Secretary in carrying out paragraph (1) may reserve a sum not to exceed 5 percent of the amount available for paragraph (1) in each fiscal year for contracts to prepare personnel in areas where shortages exist when a response to that need has not been adequately addressed by the grant process.

(b) The Secretary may make grants to institutions of higher education, State agencies and other appropriate nonprofit agencies to conduct special projects to develop and demonstrate new approaches (including the application of new technology) for the pre-service training purposes set forth in subsection (a) for regular educators, for the training of teachers to work in community and school settings with handicapped secondary school students, and for the in-service training of special education personnel, including classroom aides, related services personnel, and regular education personnel who serve handicapped children and personnel providing early intervention services.

(c)(1) The Secretary may make grants through a separate competition to private nonprofit organizations for the purpose of providing training and information to parents of handicapped children and persons who work with parents to enable such individuals to participate more effectively with professionals in meeting the educational needs of handicapped children. Such grants shall be designed to meet the unique training and information needs of parents of handicapped children living in the area to be served by the grant, particularly those who are members of groups that have been traditionally underrepresented.

(2) In order to receive a grant under paragraph (1) a private nonprofit organization shall–

(A) be governed by a board of directors of which a majority of the members are parents of handicapped children and which includes members who are professionals in the field of special education and related services who serve handicapped children and youth, or if the nonprofit private organization does not have such a board, such organization shall have a membership which represents the interests of individuals with handicapping conditions, and shall establish a special governing committee of which a majority of the members are parents of handicapped children and which includes members who are professionals in the fields of special education and related services, to operate the training and information program under paragraph (1).

(B) serve the parents of children with the full range of handicapping conditions under such grant program; and

(C) demonstrate the capacity and expertise to conduct effectively the training and information activities for which a grant may be made under paragraph (1).

(3) The board of directors or special governing committee of a private nonprofit organization receiving a grant under paragraph (1) shall meet at least once in each calendar quarter to review the parent training and information activities for which the grant is made, and each such committee shall advise the governing board directly of its views and recommendations. Whenever a private nonprofit organization requests the renewal of a grant under paragraph (1) for a fiscal year, the board of directors or the special governing committee shall submit to the Secretary a written review of the parent training and information program conducted by that private nonprofit organization during the preceding fiscal year.

(4) The Secretary shall ensure that grants under paragraph (1) will–

(A) be distributed geographically to the greatest extent possible throughout all the States and give priority to grants which involve unserved areas, and

(B) be targeted to parents of handicapped children in both urban and rural areas or on a State or regional basis.

(5) Parent training and information programs assisted under paragraph (1) shall assist parents to–

(A) better understand the nature and needs of the handicapping conditions of children,

(B) provide followup support for handicapped children's educational programs,

(C) communicate more effectively with special and regular educators, administrators, related services personnel, and other relevant professionals,

(D) participate in educational decisionmaking processes including the development of a handicapped child's individualized education program,

(E) obtain information about the programs, services, and resources available to handicapped children and the degree to which the programs, services, and resources are appropriate, and

(F) understand the provisions for the education of handicapped children as specified under part B of this Act.

(6) Parent training and information programs may, at a grant recipient's discretion, include State or local educational personnel where such participation will further an objective of the program assisted by the grant.

(7) Each private nonprofit organization operating a program receiving a grant under paragraph (1) shall consult with appropriate agencies which serve or assist handicapped children and youth and are located in the jurisdictions served by the program.

(8) The Secretary shall provide technical assistance, by grant or contract, for establishing, developing, and coordinating parent training and information programs.

Pub. L. 91-230, Title VI, Sec. 631, Apr. 13, 1970, 84 Stat. 184; amended by Pub. L. 98-199, Sec. 11, Dec. 2, 1983, 97 Stat. 1369, and by Pub. L. 99-457, Title 111, Sec. 308, Oct. 8, 1986, 100 Stat. 1165.

Sec. 1432. Grants to State educational agencies and institutions for traineeships

(a) The Secretary shall make a grant of sufficient size and scope to each State educational agency for the purposes described in subsection (c) and, in any State in which the State educational agency does not apply for such a grant, to an institution of higher education within such State for such purposes.

(b) The Secretary may also make a limited number of grants to State educational agencies on a competitive basis for the purposes described in subsection (c). In any fiscal year, the Secretary may not expend for purposes of this subsection an amount that exceeds 10 percent of the amount expended for purposes of this section in the preceding fiscal year.

(c) Grants made under this section shall be for the purpose of assisting States in establishing and maintaining preservice and inservice programs to prepare personnel to meet the needs of handicapped infants, toddlers, children, and youth or supervisors of such persons, consistent with the personnel needs identified in the State's comprehensive system of personnel development under section 613 and under section 676(b)(8).

(d) CONTINUATION GRANTS–Notwithstanding section 632 of the Education of the Handicapped (as amended by subsection (c)), the Secretary of Education may make continuation grants for the fiscal year 1989 to institutions of higher education that received competitive grants for the fiscal year 1987.

Pub. L. 91-230, Title VI, Sec. 632, Apr. 13, 1970, 84 Stat. 184; amended by Pub. L. 98-199, Sec. 11, Dec. 2, 1983, 97 Stat. 1371, and by Pub. L. 99-457, Title III, Sec. 309, Oct. 8, 1986, 100 Stat. 1168.

Sec. 1433. Clearinghouses

(a) The Secretary is authorized to make a grant to or enter into a contract with a public agency or a nonprofit private organization or institution for a national clearinghouse on the education of the handicapped and to make grants or contracts with a public agency or a nonprofit private organization or institution for other support projects which may be deemed necessary by the Secretary to disseminate information and provide technical assistance on a national basis to parents, professionals, and other interested parties concerning–

(1) programs relating to the education of the handicapped under this Act and under other Federal laws; and

(2) participation in such programs, including referral of individuals to appropriate National, State, and local agencies and organizations for further assistance.

NATIONAL CLEARINGHOUSE ON POSTSECONDARY EDUCATION FOR HANDICAPPED; ESTABLISHMENT; STATEMENT OF PURPOSE

(b) In addition to the clearinghouse established under subsection (a), the Secretary shall make a grant or enter into a contract for a national clearinghouse on postsecondary education for handicapped individuals for the purpose of providing information on available services and programs in postsecondary education for the handicapped.

(c) The Secretary shall make a grant or enter into a contract for a national clearinghouse designed to encourage students to seek careers and professional personnel to seek employment in the various fields relating to the education of handicapped children and youth through the following:

(1) Collection and dissemination of information on current and future National, regional, and State needs for special education and related services personnel.

(2) Dissemination of information to high school counselors and others concerning current career opportunities in special education, location of programs, and various forms of financial assistance (such as scholarships, stipends, and allowances).

(3) Identification of training programs available around the country.

(4) Establishment of a network among local and State educational agencies and institutions of higher education concerning the supply of graduates and available openings.

(5) Technical assistance to institutions seeking to meet State and professionally recognized standards.

(d)(1) In awarding the grants and contracts under this section, the Secretary shall give particular attention to any demonstrated experience at the national level relevant to performance of the functions established in this section, and ability to conduct such projects, communicate with the intended consumers of information, and maintain the necessary communication with other agencies and organizations.

(2) The Secretary is authorized to make contracts will profit-making organizations under this section only when necessary for materials or media access.

Pub. L. 91-230, Title VI, Sec. 633, Apr. 13, 1970, 84 Stat. 184; amended by Pub. L. 98-199, Sec. 11, Dec. 2, 1983, 97 Stat 1371, and by Pub. L. 99-457, Title III, Sec. 310, Oct. 8, 1986, 100 Stat. 1168.

Sec. 1434. Reports to Secretary

(a) Not more than sixty days after the end of any fiscal year, each recipient of a grant or contract under this part during such fiscal year shall prepare and submit a report to the Secretary. Each such report shall be in such form and detail as the Secretary determines to be appropriate, and shall include–

(1) the number of individuals trained under the grant or contract, by category of training and level of training; and

(2) the number of individuals trained under the grant or contract receiving degrees and certification, by category and level of training.

(b) A summary of the data required by this section shall be included in the annual report of the Secretary under section 618 of this Act.

Pub. L. 91-230, Title VI, Sec. 634, Apr. 13, 1970, 84 Stat. 185; amended by Pub. L. 98-199, Sec. 11, Dec. 2, 1983, 97 Stat. 1372.

Sec. 1435. Authorization of appropriations

(a) There are authorized to be appropriated to carry out this part (other than section 1433) $70,400,000 for fiscal year 1987, $74,500,000 for fiscal year 1988, and $79,000,000 for fiscal year 1989. There are authorized to be appropriated to carry out section 1433, $1,200,000 for fiscal year 1987, $1,900,000 for fiscal year 1988, and $2,000,000 for fiscal year 1989.

(b) Of the funds appropriated pursuant to subsection (a) for any fiscal year, the Secretary shall reserve not less than 65 per centum for activities described in subparagraphs (A) through (E) of section 1431(a)(1).

(c) Of the funds appropriated under subsection (a) for any fiscal year, the Secretary shall reserve 10 percent for activities under section 1431(c).

Pub. L. 91-230, Title VI, Sec. 636, Apr. 13, 1970, 84 Stat. 185; amended by Pub. L. 93-380, Title VI, Sec. 618, Aug. 21, 1974, 88 Stat. 584, Pub. L. 95- 49, Sec. 3, June 17, 1977, 91 Stat. 230, Pub.

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L. 98-199, Sec. 11, Dec. 2, 1983, 97 Stat. 1372 and by Pub. L. 99-457, Title III, Sec. 311, Oct. 8, 1986, 100 Stat. 1169.

Part E–Research In Education Of Handicapped Individuals

Sec. 1441. Research and demonstration projects in education of handicapped children

(a) The Secretary may make grants to, or enter into contracts or cooperative agreements with, State and local educational agencies, institutions of higher education, and other public agencies and nonprofit private organizations for research and related activities to assist special education personnel, related services personnel, early intervention personnel, and other appropriate persons, including parents, in improving the special education and related services and early intervention services for handicapped infants, toddlers, children, and youth, and to conduct research, surveys, or demonstrations relating to the provision of services to handicapped infants, toddlers, children, and youth. Research and related activities shall be designed to increase knowledge and understanding of handicapping conditions, and teaching, learning, and education-related developmental practices and services for handicaps infants, toddlers, children, and youth. Research and related activities assisted under this section shall include the following:

(1) The development of new and improved techniques and devices for teaching handicapped infants, toddlers, children, and youth.

(2) The development of curricula which meet the unique educational and developmental needs of handicapped infants, toddlers, children, and youth.

(3) The application of new technologies and knowledge for the purpose of improving the instruction of handicapped infants, toddlers, children, and youth.

(4) The development of program models and exemplary practices in areas of special education and early intervention.

(5) The dissemination of information on research and related activities conducted under this part to regional resource centers and interested individuals and organizations.

(6) The development of instruments, including tests, inventories, and scales, for measuring progress of handicapped infants, toddlers, children, and youth across a number of developmental domains.

(b) In carrying out subsection (a), the Secretary shall consider the special education or early intervention experience of applicants under such subsection.

(c) The Secretary shall publish proposed research priorities in the Federal Register every 2 years, not later than July 1, and shall allow a period of 60 days for public comments and suggestions. After analyzing and considering the public comments, the Secretary shall publish final research priorities in the Federal Register not later than 30 days after the close of the comment period.

(d) The Secretary shall provide an index (including the title of each research project and the name and address of the researching organization) of all research projects conducted in the prior fiscal year in the annual report described under section 1418. The Secretary shall make reports of research projects available to the education community at large and to other interested parties.

(e) The Secretary shall coordinate the research priorities established under subsection (c) with research priorities established by the National Institute on Disability and Rehabilitation Research and shall provide information concerning research priorities established under such subsection to the National Council on Disability, and to the Bureau of Indian Affairs Advisory Committee for Exceptional Children.

Pub. L. 91-230, Title VI, Sec. 641, Apr. 13, 1970, 84 Stat. 185; amended by Pub. L. 95-49, Sec. 4, June 17, 1977, 91 Stat. 230, Pub. L. 98-199, Sec. 12, Dec. 2, 1983, 97 Stat. 1372, and by Pub. L, 99-457, Title III, Sec. 312, Oct. 8, 1986, 100 Stat. 1169.

Sec. 1442. Research and demonstration projects in the physical education and recreation for handicapped children

The Secretary is authorized to make grants to States, State or local educational agencies, institutions of higher education, and other public or nonprofit private educational or research agencies and organizations, and to make contracts with States, State or local educational agencies, institutions of higher education, and other public or private educational or research agencies and organizations, for research and related purposes relating to physical education or recreation for handicapped children, and to conduct research, surveys, or demonstrations relating to physical education or recreation for handicapped children.

Pub. L. 91-230, Title VI, Sec. 642, Apr. 13, 1970, 84 Stat. 185; amended by Pub. L. 98-199, Sec. 12, Dec. 2, 1983, 97 Stat. 1373.

Sec. 1443. Panels of experts

(a) The Secretary shall convene, in accordance with subsection (b), panels of experts who are competent to evaluate proposals for projects under parts C through G. The panels shall be composed of–

(1) individuals from the field of special education for handicapped individuals and other relevant disciplines who have significant expertise and experience in the content areas and age levels addressed in the proposals, and

(2) handicapped individuals and parents of handicapped individuals when appropriate.

(b)(1) The Secretary shall convene panels under subsection (a) for any application which includes a total funding request exceeding $60,000 and may convene or otherwise appoint panels for applications which include funding requests that are less than such amount.

Such panels shall include a majority of non-Federal members. Such non-Federal members shall be provided travel and per diem not to exceed the rate provided to other educational consultants used by the Department and shall be provided consultant fees at such a rate.

(c) The Secretary may use funds available under part C through G to pay expenses and fees of non-Federal members under subsection (b).

Pub. L. 91-230, Title VI, Sec. 643, Apr. 13, 1970, 84 Stat. 185; amended by Pub. L. 98-199, Sec. 12, Dec. 2, 1983, 97 Stat. 1373, and by Pub. L. 99-457, Title III, Sec. 313, Oct. 8, 1986, 100 Stat. 1170.

Sec. 1444. Authorization of appropriations

For purposes of carrying out this part, there are authorized to be appropriated $18,000,000 for fiscal year 1987, $19,000,000 for fiscal year 1988, and $20,100,000 for fiscal year 1989.

Pub. L. 91-230, Title VI, Sec. 644, Apr. 13, 1970, 84 Stat. 186; amended by Pub. L. 93-380, Title VI, Sec. 619, Aug. 21, 1974, 88 Stat. 585, Pub. L. 95- 49, Sec. 5, June 17, 1977, 91 Stat. 231, Pub. L. 98-199, Sec. 12, Dec. 2, 1983, 97 Stat. 1374, and by Pub. L. 99-457, Title III, Sec. 314, Oct. 8, 1986, 100 Stat. 1171.

Part F–Instructional Media For Handicapped Individuals

Sec. 1451. Congressional statement of purpose

(a) The purposes of this subchapter are to promote–

(1) the general welfare of deaf individuals by (A) bringing to such individuals understanding and appreciation of those films which play such an important part in the general and cultural advancement of hearing individuals; (B) providing through these films enriched educational and cultural experiences through which deaf individuals can be brought into better touch with the realities of their environment; and (C) providing a wholesome and rewarding experience which deaf individuals may share together; and

(2) the educational advancement of handicapped persons by (A) carrying on research in the use of educational media for handicapped individuals; (B) producing and distributing educational media for the use of handicapped individuals, their parents, their actual or potential employers, and other individuals directly involved in work for the advancement of handicapped individuals; and (C) training individuals in the use of educational media for the instruction of handicapped individuals.

Pub. L. 91-230, Title VI, Sec. 651, Apr. 13, 1970, 84 Stat. 186.

Sec. 1452. Captioned films and educational media for handicapped individuals

ESTABLISHMENT OF LOAN SERVICES

(a) The Secretary shall establish a loan service of captioned films and educational media for the purpose of making such materials available, in accordance with regulations, in the United States for nonprofit purposes to handicapped individuals, parents of handicapped individuals, and other individuals directly involved in activities for the advancement of the handicapped, including for the purpose of addressing problems of illiteracy among handicapped individuals.

AUTHORITY OF SECRETARY

(b) The Secretary is authorized to–

(1) acquire films (or rights thereto) and other educational media by purchase, lease, or gift;

(2) acquire by lease or purchase equipment necessary for the administration of this subchapter;

(3) provide, by grant or contract, for the captioning of films;

(4) provide, by grant or contract, for the distribution of captioned films and educational media and equipment through State schools for handicapped individuals, public libraries, and such other agencies as the Commissioner may deem appropriate to serve as local or regional centers for such distribution.

(5) provide, by grant or contract, for the conduct of research in the use of educational and training films and other educational media for handicapped individuals and the training of persons in the use of such films and media, including the payment to those persons of such stipends (including allowances for travel and other expenses of such persons and their dependents) as the Secretary may determine, which shall be consistent with prevailing practices under comparable federally supported programs;

(6) utilize the facilities and services of other governmental agencies;

(7) accept gifts, contributions, and voluntary and uncompensated services of individuals and organizations; and

(8) provide by grant or contract for educational media and materials for deaf individuals.

(c) The Secretary may make grants to or enter into contracts or cooperative agreements with the National Theatre of the Deaf, Inc. for the purpose of providing theatrical experiences to–

(1) enrich the lives of deaf children and adults,

(2) increase public awareness and understanding of deafness and of the artistic and intellectual achievements of deaf individuals, and

(3) promote the integration of hearing and deaf individuals through shared cultural experiences.

Pub. L. 91-230, Title VI, Sec. 652, Apr. 13, 1970, 84 Stat. 186; amended by Pub. L. 93-380, Title VI, Sec. 620(1), Aug. 21, 1974, 88 Stat. 585, Pub. L. 94-482, Title V, Sec. 501(h), Oct. 12, 1976, 90 Stat. 2237, and by Pub. L. 99- 457, Title III, Sec. 315, Oct. 8, 1986, 100 Stat. 1171.

Sec. 1453. Authorization

For the purposes of carrying out this part, there are authorized to be appropriated $15,000,000 for fiscal year 1987, $15,750,000 for fiscal year 1988, and $16,540,000 for fiscal year 1989.

Pub. L. 91-230, Title VI, Sec. 654, Apr. 13, 1970, 84 Stat. 187; amended by Pub. L. 93-380, Title VI, Sec. 620(2), Aug. 21, 1974, 88 Stat. 585, Pub. L. 95-49, Sec. 6, June 17, 1977, 91 Stat. 231, Pub. L. 98-199, Sec. 13, Dec. 2, 1983, 97 Stat. 1374, and by Pub. L. 99-457, Title III, Sec. 316, Oct. 8, 1986, 100 Stat. 1171.

Part G–Technology Educational Media, And Materials For Handicapped Individuals

Sec. 1461. Financial assistance

The Secretary may make grants or enter into contracts or cooperative agreements with institutions of higher education, State and local educational agencies, or other appropriate agencies and organizations for the purpose of advancing the use of new technology, media, and materials in the education of handicapped students and the provision of early intervention to handicapped infants and toddlers. In carrying out this section, the Secretary may fund projects or centers for the purposes of–

(1) determining how technology, media, and materials are being used in the education of handicapped individuals and how they can be used more effectively,

(2) designing and adapting new technology, media, and materials to improve the education of handicapped students,

(3) assisting the public and private sectors in the development and marketing of new technology, media, and materials for the education of handicapped individuals, and

(4) disseminating information on the availability and use of new technology, media, and materials for the education of handicapped individuals.

Pub. L. 94-457 Title III, Sec. 317, Oct. 8, 1986, 100 Stat. 1171.

Sec. 1462. Authorization of appropriations

For the purposes of carrying out this part, there are authorized to be appropriated $10,000,000 for fiscal year 1987, $10,500,000 for fiscal year 1988, and $11,025,000 for fiscal year 1989.

Pub. L. 94-457, Title III, Sec. 317, Oct. 8, 1986, 100 Stat. 1171.

Part H–Handicapped Infants And Toddlers

Sec. 1471. Findings and policy

FINDINGS

(a) The Congress finds that there is an urgent and substantial need–

(1) to enhance the development of handicapped infants and toddlers and to minimize their potential for developmental delay,

(2) to reduce the educational costs to our society, including our Nation's schools, by minimizing the need for special education and related services after handicapped infants and toddlers reach school age,

(3) to minimize the likelihood of institutionalization of handicapped individuals and maximize the potential for their independent living in society, and

(4) to enhance the capacity of families to meet the special needs of their handicapped infants and toddlers.

POLICY

(b) It is therefore the policy of the United States to provide financial assistance to States–

(1) to develop and implement a statewide, comprehensive, coordinated, multidisciplinary, interagency program of early intervention services for handicapped infants and toddlers and their families,

(2) to facilitate the coordination of payment for early intervention services from Federal, State, local, and private sources (including public and private insurance coverage), and

(3) to enhance their capacity to provide quality early intervention services and expand and improve existing early intervention services being provided to handicapped infants, toddlers, and their families.

Pub. L. 99-457, Title I, Sec. 101, Oct. 8, 1986, 100 Stat. 1145.

Sec. 1472. Definitions

As used in this part–

(1) The term 'handicapped infants and toddlers' means individuals from birth to age 2, inclusive, who need early intervention services because they–

(A) are experiencing developmental delays, as measured by appropriate diagnostic instruments and procedures in one or more of the following areas: cognitive development, physical development, language and speech development, psychosocial development, or self-help skills, or

(B) have a diagnosed physical or mental condition which has a high probability of resulting in developmental delay.

Such term may also include, at a State's discretion, individuals from birth to age 2, inclusive, who are at risk of having substantial developmental delays if early intervention services are not provided.

(2) The term 'early intervention services' are developmental services which–

(A) are provided under public supervision,

(B) are provided at no cost except where Federal or State law provides for a system of payments by families, including a schedule of sliding fees,

(C) are designed to meet a handicapped infant's or toddler's developmental needs in any one or more of the following areas:

(i) physical development,

(ii) cognitive development,

(iii) language and speech development,

(iv) psychosocial development, or

(v) self-help skills,

(D) meet the standard of the State, including the requirements of this part,

(E) include–

(i) family training, counseling, and home visits,

(ii) special instruction,

(iii) speech pathology and audiology,

(iv) occupational therapy,

(v) physical therapy,

(vi) psychological services,

(vii) case management services,

(viii) medical services only for diagnostic or evaluation purposes,

(ix) early identification, screening, and assessment services, and

(x) health services necessary to enable the infant or toddler to benefit from the other early intervention services,

(F) are provided by qualified personnel, including–

(i) special educators,

(ii) speech language pathologists and audiologists,

(iii) occupational therapists,

(iv) physical therapists,

(v) psychologists,

(vi) social workers,

(vii) nurses, and

(viii) nutritionists, and

(G) are provided in conformity with an individualized family service plan adopted in accordance with section 1477.

(3) The term 'developmental delay' has the meaning given such term by a State under section 1476(b)(1).

(4) The term 'Council' means the State Interagency Coordinating Council established under section 1482.

Pub. L. 99-457, Title I, Sec. 101, Oct. 8, 1986, 100 Stat. 1146.

Sec. 1473. General authority

The Secretary shall, in accordance with this part, make grants to States (from their allocations under section 1484) to assist each State to develop a statewide, comprehensive, coordinated, multidisciplinary, interagency system to provide early intervention services for handicapped infants and toddlers and their families.

Pub. L. 99-457, Title I, Sec. 101, Oct. 8, 1986, 100 Stat. 1147.

Sec. 1474. General eligibility

In order to be eligible for a grant under section 1473 for any fiscal year, a State shall demonstrate to the Secretary (in its application under section 1478) that the State has established a State Interagency Coordinating Council which meets the requirements of section 1482.

Pub. L. 99-457, Title I, Sec. 101, Oct. 8, 1986, 100 Stat. 1147.

Sec. 1475. Continuing eligibility

FIRST TWO YEARS

(a) In order to be eligible for a grant under section 1473 for the first or second year of a State's participation under this part, a State shall include in its application under section 1478 for that year an assurance that funds received under section 1473 shall be used to assist the State to plan, develop, and implement the statewide system required by section 1476.

THIRD AND FOURTH YEAR

(b)(1) In order to be eligible for a grant under section 1473 for the third or fourth year of a State's participation under this part, a State shall include in its application under section 1478 for that year information and assurances demonstrating to the satisfaction of the Secretary that–

(A) the State has adopted a policy which incorporates all of the components of a statewide system in accordance with section 1476 or obtained a waiver from the Secretary under paragraph (2),

(B) funds shall be used to plan, develop, and implement the statewide system required by section 1476, and

(C) such statewide system will be in effect no later than the beginning of the fourth year of the State's participation under section 1473, except that in order to comply with section 1476(b)(4), a State need only conduct multidisciplinary assessments, develop individualized family service plans, and make available case management services.

Notwithstanding paragraph (1), the Secretary may permit a State to continue to receive assistance under section 1473 during such third year even if the State has not adopted the policy required by paragraph (1)(A) before receiving assistance if the State demonstrates in its application–

(A) that the State has made a good faith effort to adopt such a policy,

(B) the reasons why it was unable to meet the timeline and the steps remaining before such a policy will be adopted, and

(C) an assurance that the policy will be adopted and go into effect before the fourth year of such assistance.

FIFTH AND SUCCEEDING YEARS

(c) In order to be eligible for a grant under section 1473 for a fifth and any succeeding year of a State's participation under this part, a State shall include in its application under section 1478 for that year information and assurances demonstrating to the satisfaction of the Secretary that the State has in effect the statewide system required by section 1476 and a description of services to be provided under section 1476(b)(2).

EXCEPTION

(d) Notwithstanding subsections (a) and (b), a State which has in effect a State law, enacted before September 1, 1986, that requires the provision of free appropriate public education to handicapped children from birth through age 2, inclusive, shall be eligible for a grant under section 1473 for the first through fourth years of a State's participation under this part.

Pub. L. 99-457, Title I, Sec. 101, Oct. 8, 1986, 100 Stat. 1147.

Sec. 1476. Requirements for statewide system

IN GENERAL

(a) A statewide system of coordinated, comprehensive, multidisciplinary, interagency programs providing appropriate early intervention services to all handicapped infants and toddlers and their families shall include the minimum components under subsection (b).

MINIMUM COMPONENTS

(b) The statewide system required by subsection (a) shall include, at a minimum–

(1) a definition of the term 'developmentally delayed' that will be used by the State in carrying out programs under this part,

(2) timetables for ensuring that appropriate early intervention services will be available to all handicapped infants and toddlers in the State before the beginning of the fifth year of a State's participation under this part,

(3) a timely, comprehensive, multidisciplinary evaluation of the functioning of each handicapped infant and toddler in the State and the needs of the families to appropriately assist in the development of the handicapped infant or toddler,

(4) for each handicapped infant and toddler in the State, an individualized family service plan in accordance with section 1477, including case management services in accordance with such service plan,

(5) a comprehensive child find system, consistent with part B of this Act, including a system for making referrals to service providers that includes timelines and provides for participation by primary referral sources,

(6) a public awareness program focusing on early identification of handicapped infants and toddlers,

(7) a central directory which includes early intervention services, resources, and experts available in the State and research and demonstration projects being conducted in the State,

(8) a comprehensive system of personnel development,

(9) a single line of responsibility in a lead agency designated or established by the Governor for carrying out–

(A) the general administration, supervision, and monitoring of programs and activities receiving assistance under section 1473 to ensure compliance with this part,

(B) the identification and coordination of all available resources within the State from Federal, State, local and private sources,

(C) the assignment of financial responsibility to the appropriate agency,

(D) the development of procedures to ensure that services are provided to handicapped infants and toddlers and their families in a timely manner pending the resolution of any disputes among public agencies or service providers,

(E) the resolution of intra- and interagency disputes, and

(F) the entry into formal interagency agreements that define the financial responsibility of each agency for paying for early intervention services (consistent with State law) and procedures for resolving disputes and that include all additional components necessary to ensure meaningful cooperation and coordination,

(10) a policy pertaining to the contracting or making of other arrangements with service providers to provide early intervention services in the State, consistent with the provisions of this part, including the contents of the application used and the conditions of the contract or other arrangements,

(11) a procedure for securing timely reimbursement of funds used under this part in accordance with section 1481(a),

(12) procedural safeguards with respect to programs under this part as required by section 1480, and

(13) policies and procedures relating to the establishment and maintenance of standards to ensure that personnel necessary to carry out this part are appropriately and adequately prepared and trained, including–

(A) the establishment and maintenance of standards which are consistent with any State approved or recognized certification, licensing, registration, or other comparable requirements which apply to the area in which such personnel are providing early intervention services, and

(B) to the extent such standards are not based on the highest requirements in the State applicable to a specific profession or discipline, the steps the State is taking to require the retraining or hiring of personnel that meet appropriate professional requirements in the State, and

(14) a system for compiling data on the numbers of handicapped infants and toddlers and their families in the State in need of appropriate early intervention services (which may be based on a sampling of data), the numbers of such infants and toddlers and their families served, the types of services provided (which may be based on a sampling of data), and other information required by the Secretary.

Pub. L. 99-457, Title I, Sec. 101, Oct. 8, 1986, 100 Stat. 1148.

Sec. 1477. Individualized family service plan

ASSESSMENT AND PROGRAM DEVELOPMENT

(a) Each handicapped infant or toddler and the infant's or toddler's family shall receive–

(1) a multidisciplinary assessment of unique needs and identification of services appropriate to meet such needs, and

(2) a written individualized family service plan developed by a multidisciplinary team, including the parent or guardian, as required by subsection (d).

PERIODIC REVIEW

(b) The individualized family service plan shall be evaluated once a year and the family shall be provided a review of the plan at 6-month intervals (or more often where appropriate based on infant or toddler and family needs).

PROMPTNESS AFTER ASSESSMENT

(c) The individualized family service plan shall be developed within a reasonable time after the assessment required by subsection (a)(1) is completed. With the parent's consent, early intervention services may commence prior to the completion of such assessment.

CONTENT OF PLAN

(d) The individualized family service plan shall be in writing and contain–

(1) a statement of the infant's or toddler's present levels of physical development, cognitive development, language and speech development, psychosocial development, and self-help skills, based on acceptable objective criteria,

(2) a statement of the family's strengths and needs relating to enhancing the development of the family's handicapped infant or toddler,

(3) a statement of the major outcomes expected to be achieved for the infant or toddler and the family, and the criteria, procedures, and timelines used to determine the degree to which progress toward achieving the outcomes are being made and whether modifications or revisions of the outcomes or services are necessary,

(4) a statement of specific early intervention services necessary to meet the unique needs of the infant or toddler and the family, including the frequency, intensity, and the method of delivering services,

(5) the projected dates for initiation of services and the anticipated duration of such services,

(6) the name of the case manager from the profession most immediately relevant to the infant's or toddler's or family's needs who will be responsible for the implementation of the plan and coordination with other agencies and persons, and

(7) the steps to be taken supporting the transition of the handicapped toddler to services provided under part B to the extent such services are considered appropriate.

Pub. L. 99-457, Title I, Sec. 101, Oct. 8, 1986, 100 Stat. 1149.

Sec. 1478. State application and assurances

APPLICATION

(a) Any State desiring to receive a grant under section 1473 for any year shall submit an application to the Secretary at such time and in such manner as the Secretary may reasonably require by regulation. Such an application shall contain–

(1) a designation of the lead agency in the State that will be responsible for the administration of funds provided under section 1473,

(2) information demonstrating eligibility of the State under section 1474,

(3) the information or assurances required to demonstrate eligibility of the State for the particular year of participation under section 1475,

(4)(A) information demonstrating that the State has provided (i) public hearings, (ii) adequate notice of such hearings, and (iii) an opportunity for comment to the general public before the submission of such application and before the adoption by the State of the policies described in such application, and (B) a summary of the public comments and the State's responses,

(5) a description of the uses for which funds will be expended in accordance with this part, for the fifth and succeeding fiscal years, a description of the services to be provided,

(6) a description of the procedure used to ensure an equitable distribution of resources made available under this part among all geographic areas within the State, and

(7) such other information and assurances as the Secretary may reasonably require by regulation.

STATEMENT OF ASSURANCES

(b) Any State desiring to receive a grant under section 1473 shall file with the Secretary a statement at such time and in such manner as the Secretary may reasonably require by regulation. Such statement shall–

(1) assure that funds paid to the State under section 1473 will be expended in accordance with this part,

(2) contain assurances that the State will comply with the requirements of section 1481,

(3) provide satisfactory assurance that the control of funds provided under section 1473, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this part and that a public agency will administer such funds and property,

(4) provide for (A) making such reports in such form and containing such information as the Secretary may require to carry out the Secretary's functions under this part, and (B) keeping such records and affording such access thereto as the Secretary may find necessary to assure the correctness and verification of such reports and proper disbursement of Federal funds under this part,

(5) provide satisfactory assurance that Federal funds made available under section 1473 (A) will not be commingled with State funds, and (B) will be so used as to supplement and increase the level of State and local funds expended for handicapped infants and toddlers and their families and in no case to supplant such State and local funds,

(6) provide satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under section 1473 to the State, and

(7) such other information and assurances as the Secretary may reasonably require by regulation.

APPROVAL OF APPLICATION AND ASSURANCES REQUIRED

(c) No State may receive a grant under section 1473 unless the Secretary has approved the application and statement of assurances of that State. The Secretary shall not disapprove such an application or statement of assurances unless the Secretary determines, after notice and opportunity for a hearing, that the application or statement of assurances fails to comply with the requirements of this section.

Pub. L. 99-457, Title I, Sec. 101, Oct. 8, 1986, 100 Stat. 1150.

Sec. 1479. Uses of funds

In addition to using funds provided under section 1473 to plan, develop, and implement the statewide system required by section 1476, a State may use such funds–

(1) for direct services for handicapped infants and toddlers and their families that are not otherwise provided from other public or private sources, and

(2) to expand and improve on services for handicapped infants and toddlers and their families that are otherwise available.

Pub. L. 99-457 Title I, Sec. 101, Oct. 8, 1986, 100 Stat. 1150.

Sec. 1480. Procedural safeguards

The procedural safeguards required to be included in a statewide system under section 1476(b)(12) shall provide, at a minimum, the following:

(1) The timely administrative resolution of complaints by parents. Any party aggrieved by the findings and decision regarding an administrative complaint shall have the right to bring a civil action with respect to the complaint,

which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph, the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(2) The right to confidentiality of personally identifiable information.

(3) The opportunity for parents or a guardian to examine records relating to assessment, screening, eligibility determinations, and the development and implementation of the individualized family service plan.

(4) Procedures to protect the rights of the handicapped infant or toddler whenever the parents or guardian of the child are not known or unavailable or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State agency providing services) to act as a surrogate for the parents or guardian.

(5) Written prior notice to the parents or guardian of the handicapped infant or toddler whenever the State agency or service provider proposes to initiate or change or refuses to initiate or change the identification, evaluation, placement, or the provision of appropriate early intervention services to the handicapped infant or toddler.

(6) Procedures designed to assure that the notice required by paragraph (5) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section.

(7) During the pendency of any proceeding or action involving a complaint, unless the State agency and the parents or guardian otherwise agree, the child shall continue to receive the appropriate early intervention services currently being provided or if applying for initial services shall receive the services not in dispute.

Pub. L. 99-457, Title I, Sec. 101, Oct. 8, 1986, 100 Stat. 1151.

Sec. 1481. Payor of last resort

NONSUBSTITUTION

(a) Funds provided under section 1473 may not be used to satisfy a financial commitment for services which would have been paid for from another public or private source but for the enactment of this part, except that whenever considered necessary to prevent a delay in the receipt of appropriate early intervention services by the infant or toddler or family in a timely fashion, funds provided under section 1473 may be used to pay the provider of services pending reimbursement from the agency which has ultimate responsibility for the payment.

REDUCTION OF OTHER BENEFITS

(b) Nothing in this part shall be construed to permit the State to reduce medical or other assistance available or to alter eligibility under title V of the Social Security Act (relating to maternal and child health) or title XIX of the Social Security Act (relating to medicaid for handicapped infants and toddlers) within the State.

Pub. L. 99-457, Title I, Sec. 101, Oct. 8, 1986, 100 Stat. 1152.

Sec. 1482. State interagency coordinating council

ESTABLISHMENT

(a)(1) Any State which desires to receive financial assistance under section 1473 shall establish a State Interagency Coordinating Council composed of 15 members.

(2) The Council and the chairperson of the Council shall be appointed by the Governor. In making appointments to the Council, the Governor shall ensure that the membership of the Council reasonably represents the population of the State.

COMPOSITION

(b) The Council shall be composed of–

(1) at least 3 parents of handicapped infants or toddlers or handicapped children aged 3 through 6, inclusive,

(2) at least 3 public or private provider of early intervention services

(3) at least one representative from the State legislature,

(4) at least one person involved in personnel preparation,

(5) other members representing each of the appropriate agencies involved in the provision of or payment for early intervention services to handicapped infants and toddlers and their families; and

(6) others selected by the Governor.

MEETINGS

(c) The Council shall meet at least quarterly and in such places as it deems necessary. The meetings shall be publicly announced, and, to the extent appropriate, open and accessible to the general public.

MANAGEMENT AUTHORITY

(d) Subject to the approval of the Governor, the Council may prepare and approve a budget using funds under this part to hire staff, and obtain the services of such professional, technical, and clerical personnel as may be necessary to carry out its functions under this part.

FUNCTIONS OF COUNCIL

(e) The Council shall–

(1) advise and assist the lead agency designated or established under section 1476(b)(9) in the performance of the responsibilities set out in such section, particularly the identification of the sources of fiscal and other support for services for early intervention programs, assignment of financial responsibility to the appropriate agency, and the promotion of the interagency agreements,

(2) advise and assist the lead agency in the preparation of applications and amendments thereto, and

(3) prepare and submit an annual report to the Governor and to the Secretary on the status of early intervention programs for handicapped infants and toddlers and their families operated within the State.

CONFLICT OF INTEREST

(f) No member of the Council shall cast a vote on any matter which would provide direct financial benefit to that member or otherwise give the appearance of a conflict of interest under State law.

USE OF EXISTING COUNCILS

(g) To the extent that a State has established a Council before September 1, 1986, that is comparable to the Council described in this section, such Council shall be considered to be in compliance with this section. Within 4 years after the date the State accepts funds under section 1473, such State shall establish a council that complies in full with this section.

Pub. L. 99-457, Title I, Sec. 101, Oct. 8, 1986, 100 Stat. 1153.

Sec. 1483. Federal administration

Sections 1416, 1417, and 1420 shall, to the extent not inconsistent with this part, apply to the program authorized by this part, except that–

(1) any reference to a State educational agency shall be deemed to be a reference to the State agency established or designated under section 1476(b)(9),

(2) any reference to the education of handicapped children and the education of all handicapped children and the provision of free public education to all handicapped children shall be deemed to be a reference to the provision of services to handicapped infants and toddlers in accordance with this part, and

(3) any reference to local educational agencies and intermediate educational agencies shall be deemed to be a reference to local service providers under this part.

Pub. L. 99-457, Title I, Sec. 101, Oct. 8, 1986, 100 Stat. 1154.

Sec. 1484. Allocation of funds

(a) From the sums appropriated to carry out this part for any fiscal year, the Secretary may reserve 1 percent for payments to Guam, American Samoa, the Virgin Islands, the Republic of the Marshall Islands, the Federated States of

Micronesia, the Republic of Palau, and the Commonwealth of the Northern Mariana Islands in accordance with their respective needs.

(b)(1) The Secretary shall make payments to the Secretary of the Interior according to the need for such assistance for the provision of early intervention services to handicapped infants and toddlers and their families on reservations serviced by the elementary and secondary schools operated for Indians by the Department of the Interior. The amount of such payment for any fiscal year shall be 1.25 percent of the aggregate of the amount available to all States under this part for that fiscal year.

(2) The Secretary of the Interior may receive an allotment under paragraph (1) only after submitting to the Secretary an application which meets the requirements of section 1478 and which is approved by the Secretary. Section 1416 shall apply to any such application.

(c)(1) For each of the fiscal years 1987 through 1991 from the funds remaining after the reservation and payments under subsections (a) and (b), the Secretary shall allot to each State an amount which bears the same ratio to the amount of such remainder as the number of infants and toddlers in the State bears to the number of infants and toddlers in all States, except that no State shall receive less than 0.5 percent of such remainder.

(2) For the purpose of paragraph (1)–

(A) the terms 'infants' and 'toddlers' mean children from birth to age 2, inclusive, and

(B) the term 'State' does not include the jurisdictions described in subsection (a).

(d) If any State elects not to receive its allotment under subsection (c)(1), the Secretary shall reallot, among the remaining States, amounts from such State in accordance with such subsection.

Pub. L. 99-457 Title I, Sec. 101, Oct. 8, 1986, 100 Stat. 1154.

Sec. 1485. Authorization of appropriations

There are authorized to be appropriated to carry out this part $50,000,000 for fiscal year 1987, $75,000,000 for fiscal year 1988, and such sums as may be necessary for each of the 3 succeeding fiscal years.

STUDY OF SERVICES; COORDINATION OF ACTIONS

Section 101(b) of Pub. L. 99-457 provided that:

(1) The Secretary of Education and the Secretary of Health and Human Services shall conduct a joint study of Federal funding sources and services for early intervention programs currently available and shall jointly act to facilitate interagency coordination of Federal resources for such programs and to ensure that funding available to handicapped infants, toddlers, children, and youth from Federal programs, other than programs under the Education of the Handicapped Act, is not being withdrawn or reduced.

(2) Not later than 18 months after the date of the enactment of this Act, the Secretary of Education and the Secretary of Health and Human Services shall submit a joint report to the Congress describing the findings of the study conducted under paragraph (1) and describing the joint action taken under that paragraph.

Pub. L. 99-457, Title I, Sec. 101, Oct. 8, 1986, 100 Stat. 1155.

Sec. 109. Special Rule for Fiscal Year 1987 Preschool Grants

(a) SPECIAL RULE–Notwithstanding section 412(b)(2) of the General Education Provisions Act, a State educational agency may use funds made available in fiscal year 1986 under section 619 of the Education of the Handicapped Act for expenditure in fiscal year 1987 in accordance with the statutory and regulatory provisions relating to such program that were in effect for fiscal year 1986 and the application submitted by such agency for such program for such fiscal year.

(b) EFFECTIVE DATE–This section shall be effective as of October 1, 1987.

Sec. 110. Preschool Grants

The provisions of section 300.300(b)(3) of title 34, Code of Federal Regulations, shall not apply with respect to children aged 3 through 5, inclusive, in any State for any fiscal year for which the State receives a grant under section 619(a)(1) of the Education of the Handicapped Act.

Pub. L. 100-630, Nov. 7, 1988, 102 Stat. 3289.

Appendix I

SAMPLE IEP FORM

CHILD'S NAME ____________________ DATE OF BIRTH ________________

PARENTS' NAMES ____________________ PHONE NO. ________________

ADDRESS ____

GRADE ______________________________ TEACHER ________________

SCHOOL ____________________________ DISTRICT ________________

I. PRESENT LEVEL OF EDUCATIONAL PERFORMANCE (academic, emotional maturity, self-help skills, vocational skills, prevocational skills).

A. FORMAL AND INFORMAL ASSESSMENT (any evaluations done on the child. This includes psychological testing scores and interpretations, speech pathologist reports, occupational and physical therapy reports, physician reports, counselor reports).

B. CHILD'S LEARNING CHARACTERISTICS (how the child learns)

C. SOCIO-EMOTIONAL BEHAVIORS (child's behavior with adults and peers)

D. SENSORY AND MOTOR SKILLS (vision, hearing, fine and gross motor skills)

E. PHYSICAL AND MEDICAL ASSESSMENT

F. CURRENT TEACHER'S REPORT

II. ANNUAL GOALS (overview of the student's program for the year).

A. One goal should be written for each area of special instruction. The goals should be clearly stated.

B. Consider: math, language, science, social studies, health, home economics, technology, art, music, physical education, library, lunch, recess periods, extracurricular activities, self-help skills, language and motor development.

III. SHORT-TERM OBJECTIVES (attached on separate sheets)

Make sure that there is a hierarchical list of objectives for each of the annual goals listed.

IV. SPECIFIC SPECIAL EDUCATION AND RELATED SERVICES TO BE PROVIDED

A. Remember to place the child in the least restrictive environment and with as many non-handicapped children as possible.

B. Consider whether the child needs occupational or physical therapy, speech therapy, notetakers, adaptive physical education, individual or family counseling.

C. Consider transportation issues and accessibility of the building and the services.

D. Determine whether any equipment will be required, such as hearing aids, touch talkers, wheelchairs, tape recorders, braille equipment, and so forth.

V. AMOUNT OF INTEGRATION IN REGULAR EDUCATION CLASSES

Although the IEP does not have to specify goals for regular education classes, there should be at least a listing of the academic and non-academic areas the child will be mainstreamed into for the year.

VI. PROJECTED INITIATION DATE AND ANTICIPATED DURATION OF SERVICES

The dates should be as specific as possible and include at least an annual review date.

VI. OTHER RECOMMENDATIONS

Consider anything not covered above.

DATE:

SIGNATURES OF PARTICIPANTS	TITLE

Everyone who was present at the meeting and had input into the IEP should sign the form to show their approval of the plan.

Note: This sample was made by taking into consideration many actual IEP forms, information from Bonnie Strickland and Ann Turnbull, *Developing and Implementing Individualized Education Programs* (Merrill Publishing Co., Columbus, Ohio, 3d edition, 1990) and James C. Chalfant and Margaret Van Dusen Pysh, *The Compliance Manual: A Guide to the Rules and Regulations of the Education for All Handicapped Children Act, Public Law 94-142* (Pem Press, New Rochelle, New York, 1980).

Appendix

J

SUGGESTED CHECKLIST FOR IEPs

1. Child's Name
2. Child's Date of Birth
3. Address and Phone
4. Parents' Names
5. School, District, Class, Grade, Teacher
6. List of all Members Present at IEP Meeting
7. Current Educational Performance
    - listing of strengths and weaknesses
    - psychologist's report
    - testing scores and interpretations of scores
    - counselor's report
    - speech therapist's report
    - medical assessment
    - occupational therapy report
    - physical therapy report
    - current teacher's report
    - social history
    - statements of problem areas and child's progress therein
    - formal and informal assessment data
    - statement of the child's style of learning
    - statement of the child's socio-emotional development
    - report of the child's achievement on prior IEPs
    - are data current?

8. Annual Goals
    - Do they relate to the child's current performance?
    - Are they within reach for the child for one year?
    - Does each goal subsume all of the related short-term objectives?
    - Does each goal reflect anticipated learning of more than one behavior?
    - Does each goal reflect anticipated growth within the subcategories of the instructional area?
    - Are the goals positively stated?
    - Are the goals practical?
    - Are the goals clear and understandable (not too vague or too specific)?
    - Is at least one goal specified for each area of need?
    - Are goals prioritized?
    - Are goals relevant and practical, given the child's age and remaining school years?

9. Short-Term Objectives
    - Are the objectives linked to the annual goals?
    - Do the objectives state when, what, and where they will be performed?
    - Are the objectives measurable?
    - Are the objectives in logical sequence?
    - Are all objectives needed to accomplish the goal included?
    - Are the objectives clearly written and understandable?
    - Are objectives specified for each annual goal?

10. Initiation Date and Duration of Services
    - Specific initiation date
    - Date for review of services

11. Services To Be Provided and Placement
    - Is placement in the least restrictive environment?
    - Does the IEP list the extent to which the child will participate in regular education?
    - Is mainstreaming appropriate for: music, art, library, recess, lunch, homeroom, and so forth?
    - Is occupational therapy appropriate?
    - Is physical therapy appropriate?
    - Is speech therapy appropriate?
    - Is individual counseling appropriate?
    - Is family counseling appropriate?
    - Is physical education (or adaptive physical education) appropriate?
    - Is any equipment needed?
    - Are there any accessibility problems or physical barriers?

12. Objective Criteria and Evaluation
    - Are the criteria measurable?
    - Are the criteria objective (or subjective)?
    - Do the criteria relate to each short-term objective?

13. Parents' Signatures and Signatures of School Personnel and the Entire Team Who Developed the Plan.

Note: This checklist was developed in part from materials taken from *Directions III: A Guidebook for Families* (Western Los Angeles Director Service, Inglewood, California); Midwest Regional Resource Center for the ADE *Guide to Process of Writing IEP*; and a draft of a resource manual entitled "Analyzing the Instructional Process" by Dr. James W. Tawney.

Appendix K

CHECKLIST OF CONCERNS

I. COMMUNICATION SKILLS—PRESCHOOL

Nature of Communication: ______

1. Communicates by gesture only ______
2. Communicates by sound and gesture ______
3. Uses single words or short phrases ______
4. Uses complete sentences ______

Intelligibility of Speech

1. No understandable speech ______
2. Speech understood only when combined with gestures ______
3. Speech understood by immediate family ______
4. Speech understood by listener in known situation ______
5. Speech understood by almost everyone ______

Name

1. Does not respond to name ______
2. Sometimes responds to name ______
3. Frequently responds to name ______
4. Can give first name ______, first and last names ______, full name ______
5. Can identify name when sees written ______
6. Can write first name ______, first and last names ______, full name ______

Stories, Records, Television

1. Does not listen to stories ______

2. Listens, but loses interest before end _______
3. Listens and answers simple questions about _______
4. Can retell or explain story _______

Response to Verbal Directions
1. Does not respond to verbal directions _______
2. Responds to short directions _______
3. Responds to series of directions _______
4. Responds to directions after a time lapse _______

Experiences
1. Does not relate own experiences _______
2. Indicates that experience took place _______
3. Tells highlights _______
4. Relates experience with detail _______

II. PHYSICAL DEVELOPMENT SKILLS—PRESCHOOL

Walking
1. Is not ambulatory _______
2. Is ambulatory with braces _______, crutches _______, or wheelchair _______
3. Walks, but is clumsy _______
4. Walks, well coordinated _______
5. Walks and runs _______
6. Climbs _______

Grasp
1. Cannot grasp objects _______
2. Grasps objects clumsily _______
3. Can grasp large objects _______
4. Can grasp small objects (pencil, crayon) _______

Catching
1. Cannot catch ball _______
2. Traps ball against chest with two hands _______
3. Catches ball with both hands _______
4. Catches ball with one hand _______

Scissors
1. Cannot cut with scissors _______
2. Can cut with scissors with assistance _______
3. Cuts a straight line with scissors _______
4. Cuts design with scissors _______

8. Seeks attention excessively	______	______	______
9. Cannot work alone	______	______	______
10. Easily confused or disoriented	______	______	______
11. Forgetful, needs constant reminders	______	______	______
12. Overly sensitive to criticism	______	______	______
13. Shows signs of anxiety (crying, nail biting)	______	______	______
14. Puts blame for behavior on external causes	______	______	______
15. Will not speak up	______	______	______
16. Shows off (clowning, bragging, teasing, etc.)	______	______	______
17. Speaks inappropriately (threatens, curses, etc.)	______	______	______
18. Antisocial tendencies (steals, lies, fights)	______	______	______
19. Hurries through work	______	______	______
20. Works too slowly	______	______	______
21. Easily distracted from work	______	______	______
22. Difficulty changing activities	______	______	______
23. Tires easily	______	______	______
24. Overly active (does not sit down, etc.)	______	______	______
25. Relationships with other children	______	______	______
26. Relationships with adults	______	______	______
27. Other	______	______	______

When do behavior problems occur most frequently?

_____ Morning _____ Mid-day
_____ Afternoon
_____ Before a class change (to playground, lunch, class, etc.)
_____ After a class change
_____ Before a specific subject (please list subject: ________________)
_____ In a large group _____ With the teacher(s)
_____ In a small group _____ With peers

What remedial and/or behavioral techniques have been attempted with the child? (Please be as specific as possible)

---

* From the Clinical Center for the Study of Development and Learning, The University of North Carolina at Chapel Hill. Reprinted by permission. Adapted with permission from an adaptation that appeared in Bonnie Strickland and Ann Turnbull, *Developing and Implementing Individualized Education Programs* (Merrill Publishing Co., Columbus, Ohio, 1990) App. B. of the Pre-Academic School Checklist.

Appendix

L

CURRICULUM CHECKLIST

I. ARITHMETIC MEASUREMENT—PRIMARY LEVEL

1. Can match the following size and amount terms:
    - _____ a. More-less
    - _____ b. Big-little
    - _____ c. Long-short
    - _____ d. Large-small
    - _____ e. Many-few
    - _____ f. Heavy-light
    - _____ g. High-low
    - _____ h. Tall-short
    - _____ i. All-some-none
    - _____ j. Fat-thin
    - _____ k. Young-old
    - _____ l. Far-near

_______ 2. Compares objects according to the previously mentioned terms.

_______ 3. Can state and demonstrate the meaning of 1/2 and 1.

_______ 4. Recognizes and understands the measures of pint, 1/2 pint, and so on.

_______ 5. Recognizes and understands the measures of tablespoon and teaspoon.

_______ 6. Understands that a thermometer measures temperature.

_______ 7. Can distinguish between body and weather thermometers.

II. MEASUREMENT—INTERMEDIATE

_______ 1. When shown a ruler and a yardstick, can tell which is equal to a foot and which is equal to a yard.

_______ 2. States the following relative values:

    _______ a. 1 foot = 12 inches

_______ b. 1 yard = 36 inches
_______ c. 1 yard = 3 feet

_______ 3. Converts values from one measure to another.
_______ 4. Uses ruler and yardstick to measure environmental objects.
_______ 5. When shown containers which measure gallons, 1/2 gallons, quarts, and cups, can state the measurements of the containers.
_______ 6. States the following relative values:
    _______ a. 1 gallon = 4 quarts
    _______ b. 1/2 gallon = 2 quarts

III. MEASUREMENT—JUNIOR HIGH

_______ 1. Knows the measure of a mile.
_______ 2. Knows the approximate number of miles between significant points such as:
    _______ a. Home to school
    _______ b. Home to friend's house
    _______ c. Community to neighboring community.
_______ 3. Can point out the measurements of bushel and peck.
_______ 4. Knows the following relative values:
2 gallons = 1 peck; 4 pecks = 1 bushel;
8 gallons = 1 bushel.
_______ 5. Can convert values from one measure to another.
_______ 6. Uses various measurement devices for length such as yardstick, tape measure, carpenter's ruler.
_______ 7. Can correctly measure all objects in classroom.
_______ 8. Uses various measurements in multiplication and division problems related to situations in daily living.
_______ 9. Uses thermometer to take body temperature.
_______ 10. States that normal body temperature is 98.6 degrees F.
_______ 11. Illustrates the meaning of 1/2 and 1/4.
_______ 12. Knows the meaning of an ounce.
_______ 13. States the number of ounces in a pound.
_______ 14. Knows that some produce items and meat are usually sold for a certain price per pound.
_______ 15. Utilizes liquid measurements in following cooking recipes.
_______ 16. Gives a simple definition of area.
_______ 17. Shows the meaning of square inch, square foot, square yard.
_______ 18. Converts inches to square inches, feet to square feet, yards to square yards.

IV. MEASUREMENT—SENIOR HIGH

________ 1. Understands and practices measurement skills as related to the demands of the pupil's desired vocation.
________ 2. Uses postal scales to determine the correct amount of postage for letters and small packages.
________ 3. Uses scales to determine the weight of various objects.
________ 4. Practices measuring as related to household needs:
  _____ a. Measures rooms in house and computes the size of floor covering.
________ _____ b. Measures windows and computes size of curtains and length of rods.
________ _____ c. Measures door frame for screening.
________ 5. Practices measuring for basic shop work.
________ 6. Uses legend on map to estimate miles.
________ 7. Explains how to use an odometer and speedometer.

SOCIAL COMPETENCE

I. UNDERSTANDING AND ACCEPTING ONESELF—PRIMARY LEVEL

1. Understands self emotionally and physically:
  _____ a. Recognizes and tells full name.
  _____ b. Recognizes and tells address, birth date, age, and telephone number.
  _____ c. Knows and tells race and religion.
  _____ d. Verbalizes things he likes and dislikes.
  _____ e. Engages in play activities appropriate to age and sex.
  _____ f. Identifies times when he is happy and sad.
  _____ g. Says people differ in appearance.
  _____ h. Explains that his physical and emotional well-being affect the way he does school work.
  _____ i. Begins to accept any physical limitation.
2. Understands assets and limitations:
  _____ a. Explains that everyone has strengths and weaknesses.
  _____ b. Recognizes and tells about individual differences within class.
  _____ c. Identifies his own major strengths and weaknesses.
3. Establishes feelings of self-respect:
  _____ a. Takes pride in accomplishment.
  _____ b. Continues to try after experiencing failure.

II. UNDERSTANDING AND ACCEPTING ONESELF—INTERMEDIATE LEVEL

1. Understands self emotionally and physically:
    - _____ a. Identifies times when he is happy or sad.
    - _____ b. Identifies things that make him happy or sad.
    - _____ c. Identifies things that make him angry.
    - _____ d. Identifies various ways in which happiness, sadness, and anger can be expressed.
    - _____ e. Identifies person he admires and states reasons.
    - _____ f. Explains that children grow at different rates.
    - _____ g. Tells that body will change in physical ways.
    - _____ h. Begins to explain implications of physical disability.
    - _____ i. Accepts responsibility for remediating physical disability such as wearing hearing aid or brace.
2. Can explain assets and limitations:
    - _____ a. Identifies his strengths and weaknesses related to academic subjects and recreational activities.
    - _____ b. Explains terminology he might hear around the school that is associated with the special class (EMR, retarded, and so forth).
    - _____ c. Explains the importance of accepting limitations while at the same time working hard to remediate them.
    - _____ d. Explains that everyone is retarded or limited in some way.
3. Establishes feelings of self-respect:
    - _____ a. Associates feelings of self-gratification with successfully completing a task.
    - _____ b. Approaches a new task with a positive attitude.
    - _____ c. Does not feel personally threatened when he fails a particular test.
    - _____ d. Shows respect for others and expects respect from others.

III. UNDERSTANDING AND ACCEPTING ONESELF—JUNIOR HIGH SCHOOL

1. Understands self emotionally and physically:
    - _____ a. Uses socially acceptable outlets for his emotions.
    - _____ b. Identifies various sources of anxieties and frustrations.
    - _____ c. Explains ways of dealing with anxieties and frustrations.
    - _____ d. Realizes need for maintaining self-control.
    - _____ e. Tells about emotional changes associated with puberty.
    - _____ f. Explains manner in which emotional problems impede academic achievement and job success.
    - _____ g. Can explain physical changes occurring during puberty.
    - _____ h. Shows concern for making most of his physical appearance.

2. Explains assets and limitations:
   - _____ a. Tells the scope of the special education program.
   - _____ b. Tells that some people will ridicule or reject him because he is handicapped.
   - _____ c. Sets realistic goals for academic achievement.
   - _____ d. Begins to make appropriate vocational plans with consideration for assets and limitations.

3. Establishes feelings of self-respect:
   - _____ a. Feels capable of assuming personal responsibility within peer group.
   - _____ b. Takes pride in accomplishments.
   - _____ c. Feels that accomplishments are worthwhile and significant.

V. UNDERSTANDING AND ACCEPTING ONESELF—SENIOR HIGH LEVEL

1. Can explain self emotionally and physically:
   - _____ a. Has stable emotional adjustment.
   - _____ b. Maintains self-control.
   - _____ c. Realizes potential emotional problems and knows how to handle them.
   - _____ d. Tells about agencies and people within the community that offer emotional support and/or counseling.
   - _____ e. Makes the most of physical appearance.
   - _____ f. Accepts physical limitations and unattractive aspects of physical appearance.

2. Explains assets and limitations:
   - _____ a. Finds appropriate vocational placement in regard to abilities.
   - _____ b. Explains the long-range effects of his limitations on job opportunities.
   - _____ c. Tells about the standard of living that will be in line with his salary.

3. Establishes feelings of self-respect:
   - _____ a. Takes pride in job.
   - _____ b. Takes pride in home, community, and recreational activities.
   - _____ c. Realizes he is contributing member of society.
   - _____ d. States that he feels as if he can cope with most adult situations.

Note: This sample was adapted from Bonnie Strickland and Ann Turnbull, *Developing and Implementing Individualized Education Programs* (Merrill Publishing Co., Columbus, Ohio, 3d edition, 1990) App. E.

Appendix

M

CHECKLIST OF WORK BEHAVIORS FOR VOCATIONAL EDUCATION

I. DEVELOPS FUNCTIONAL CAREER AWARENESS

Skills	Mastered	Developing	Not Introduced
1. Adheres to school and class rules	______	______	______
2. Recognizes self as a co-worker in the classroom	______	______	______
3. Matches various jobs with developing interests and skills	______	______	______
4. Works independently	______	______	______
5. Completes work on time	______	______	______
6. Works steadily at task for an established period of time	______	______	______
7. Takes pride in class work	______	______	______
8. Applies functional academic skills such as telling time, counting money, making change	______	______	______
9. Maintains personal hygiene for employment	______	______	______

II. JOB-SEEKING SKILLS

1. Reads and selects a possible job from help-wanted ads	______	______	______

2. Writes a job-application letter ______ ______ ______
3. Fills out a simple job application ______ ______ ______
4. Identifies transportation options for getting to work ______ ______ ______
5. Uses public transportation to get to job site ______ ______ ______
6. Demonstrates appropriate interview techniques ______ ______ ______
7. Maintains appropriate appearance and dress ______ ______ ______

III. ON-THE-JOB SKILLS

1. Works without excessive supervision ______ ______ ______
2. Arrives to work on time ______ ______ ______
3. Resumes work after break ______ ______ ______
4. Attends work regularly ______ ______ ______
5. Can maintain a time card ______ ______ ______
6. Seeks assistance from supervisor when necessary ______ ______ ______
7. Works steadily at a task for established period ______ ______ ______
8. Works at task to completion ______ ______ ______
9. Works without interfering with co-workers ______ ______ ______
10. Exhibits courteous behavior toward co-workers ______ ______ ______
11. Is courteous in verbal interactions with supervision ______ ______ ______
12. Follows verbal/written directions ______ ______ ______
13. Observes rules ______ ______ ______
14. Maintains own work area ______ ______ ______
15. Works accurately at job assignment ______ ______ ______
16. Works at job assignment with adequate speed ______ ______ ______
17. Accepts constructive criticism

Note: This sample was adapted from Bonnie Strickland and Ann Turnbull, ***Developing and Implementing Individualized Education Programs*** (Merrill Publishing Co., Columbus, Ohio, 3d edition, 1990), Figure 9-9, at 234.

List of Acronyms

ADA	Americans with Disabilities Act of 1990
ADD	Attention Deficit Disorder
ADR	Alternative Dispute Resolution
AIDS	Acquired Immune Deficiency Syndrome
ANSI	American National Standards Institute
APA	Administrative Procedures Act
ARC	AIDS-Related Complex
ATBCB	Architectural and Transportation Barriers Compliance Board
BEH	Bureau of Education of the Handicapped
CAB	Civil Aeronautics Board
DAS	Division of Assistance to States
DHHS	Department of Health and Human Services
DOD	Department of Defense
DOE	Department of Education
DOJ	Department of Justice

DOL	Department of Labor
DOT	Department of Transportation
EAHCA	Education for All Handicapped Children Act
EEOC	Equal Employment Opportunity Commission
EHLR	Education for the Handicapped Law Report
EIDA	Education of Individuals with Disabilities Act (pending)
FAPE	Free Appropriate Public Education
FCC	Federal Communications Commission
FERPA	Family Educational Rights and Privacy Act
GSA	General Services Administration
HCPA	Handicapped Children's Protection Act
HEW	Department of Health, Education and Welfare
HUD	Department of Housing and Urban Development
IDEA	Individuals with Disabilities Education Act (pending)
IEP	Individualized Education Program
IFSP	Individualized Family Service Plan
LD	Learning Disabilities
LEA	Local Education Agency
LRE	Least Restrictive Environment
MCTs	Minimal Competency Tests
MET	Multidisciplinary Education Team
OCR	Office for Civil Rights (Department of Education)
OCR	Office of Civil Rights
OFCCP	Office of Federal Contract Compliance Programs

OPM	Office of Personnel Management
OSE	Office of Special Education
OSEP	Office of Special Education Programs
OSERS	Office of Special Education and Rehabilitation Services
SBA	Small Business Association
SEA	State Education Agency
SIBIS	Self-Injurious Behavior Inhibiting Systems
UFAS	Uniform Federal Accessibility Standards

Table of Cases

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A.A. v. Cooperman, 1986-87 ELHR 558:464 (Sup. Ct. A.D., N.J., 1987), 16:23n

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Americans Disabled for Accessible Public Transportation (ADAPT) v. Burnley, 867 F.2d 1471 (3d Cir. 1989), vacated and rehearing en banc granted, 871 F.2d 1229 (3d Cir.), cert denied, 110 S. Ct. 87 (1989), 10:6n

American v. Lewis, 655 F.2d 12. 635 (E.D. Pa. 1988), aff'd in part and rev'd in part, 867 F.2d 1229 (3d Cir. 1989), vacated and rehearing en banc granted, 871 F.2d 1229 (3d Cir.), cert. denied, 110 S. Ct. 87 (1989), aff'd, 881 F.2d 1184 (3d Cir. 1989), 4:6n; 10:6-11

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